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No.

IN THE

Supreme Court of the United States

CHADWICK E. WELLS, PETITIONER

v.

CITY OF ALEXANDRIA; JOHN HAMERNICK;
WILLIAM GERARD ALWELL,

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the District Court and the Court of Appeals err in their decisions granting respondents' motions for summary judgment regarding petitioner's Louisiana state intentional tort claim by failing to analyze petitioner's evidence opposing said motions in accordance with the summary judgment guidelines set forth by this Court in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed. 2d 202 (1986) when they:

   (a) failed to give any weight to petitioner's contradictory evidence **a light most favorable to petitioner in** which evidence consisted of petitioner's own sworn testimony and the sworn deposition testimony of seven (7) former co-employees including petitioner's former immediate supervisor;

   (b) made an adverse evidentiary inference and conclusion that the evidence of the individual defendants' anger and retaliatory motive was not proof of a desire on their part to physically injure petitioner;

   (c) made a credibility determination regarding the sworn testimony of petitioner and seven (7) former co-

employees by characterizing said testimony as "colorable" and rejecting it; and

A. decided the issue of the individual defendants' state of mind regarding their motive and intent in their actions toward petitioner on summary judgment.

II. Did the Court of Appeals err in deciding a factual issue that was raised for the first time on appeal in oral argument and was not presented to the District Court. The Court of Appeals erred by:

(a) allowing counsel for defendants to raise a new issue at oral argument that was not previously argued to the District Court below;

(b) denying petitioner the opportunity to offer evidence in response to that issue; and

(c) making a factual determination on that issue in support of its decision sustaining the District Court's granting of respondents' motions for summary judgment.

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STATUTES

28 U.S.C. § 1254(1) 1

OPINIONS BELOW

The unpublished April 29, 2004 panel opinion of the United States Court of Appeals for the Fifth Circuit is reported at 2004 WL 909735 (5th Cir., 4/20/04) and is reprinted at App. A. The May 24, 2004 Fifth Circuit Petition for Rehearing opinion is reprinted at App. C. The April 19, 2004 Court of Appeals decision denying petitioner's Motion to Supplement Record is reprinted at App. E. The July 15, 2003 Memorandum Ruling of the United States District Court for the Western District of the State of Louisiana is reprinted at App. B.

JURISDICTION

The Fifth Circuit issued an opinion denying petitioner's Petition for Rehearing on May 24, 2004. This Petition for Certiorari is timely in that petitioner has filed it within 90 days of May 24, 2004. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATEMENT

Petitioner, Chad E. Wells, a present resident of Alabama, filed this action against his former employer, City of Alexandria ("City") and two (2) of his former supervisors, John Hamernick, Jr. ("Hamernick") and William Gerard Alwell ("Alwell"). Originally filed in Louisiana state court, the case was removed to federal court based on diversity and federal question jurisdiction.

Petitioner was employed as an Operator 2 by defendant City in its Electric Production Department

until he resigned in April 2001. Defendant Alwell was the Superintendent of the Electric Production Department and defendant Hamernick was the Chief Plant Operator.

Petitioner alleged several grounds in his state court petition as a basis for this action. (App. F) Of particular note for purposes of this petition is his allegation that the individual defendants, while acting within the course and scope of their employment, intentionally assigned him job duties that exceeded his treating physician's post-knee surgery restrictions. These actions caused petitioner to re-injure his knee and sustain additional pain and suffering. He contends that the defendants' actions were intentional and were taken in reprisal to punish petitioner for his actions in reporting defendants' after work activities to the Louisiana State Police.

In Louisiana, an employee may sue his employer in tort for injuries that result from an intentional act. The Louisiana Supreme Court in *Reeves vs. Structural Preservation Systems*, 731 So.2d 208, 211 (La. 1999) defined that cause of action:

> "We held that the meaning of 'intent' in this context 'is that the person who acts either (1) consciously desires the physical result of his act, whatever the likelihood of that result happening from his conduct; or (2) knows that the result is substantially certain to follow from his conduct, whatever his desire may be as to that result." [Quoting *Bazley v. Tortorich*, 397 So.2d 475, 481 (La. 1981)]

Cases where an employer was held to have consciously desired the physical result of his act are *Caudle v. Betts*, 512 So.2d 389 (La. 1987) and *Benoit v. Capitol Manufacturing Co.*, 617 So.2d 477 (La. 1993)

In the instant case, petitioner contends that defendants Alwell and Hamernick had the actual desire to cause him injury by ordering him to do physical activities they knew were precluded by his treating physician and the medical condition of his right knee. The motive for this desire was to retaliate or punish petitioner for his reporting to the Louisiana State Police defendants' conduct of removing red roofing material after work from a City job site which report precipitated an investigation by that agency. Petitioner contended that the evidence supported the finding that the individual defendants had a hostile intent or a desire to do him harm by specifically ordering him to do physical job tasks that they knew were in direct violation of his doctor's post-surgery restrictions.

Respondents filed motions for summary judgment on the grounds that there was no genuine issue of material fact and they were entitled to judgments as a matter of law.

Petitioner opposed the motions of defendants on the grounds that the pleadings and depositions with attached exhibits filed in opposition to defendants' motions, showed that genuine factual issues existed regarding: (1) whether or not the individual defendants Hamernick and Alwell violated the law in accepting a gift of roofing material from a City contractor; (2) that the defendants acted with the actual desire to cause petitioner injury in reprisal and/or retaliation for his

reporting the individual defendants' activity to the Louisiana State Police; (3) that defendants constructively discharged petitioner from his employment by making his work conditions too onerous; and (4) that at all times pertinent herein, the individual defendants were acting within the course and scope of their employment with the City. Petitioner submitted the deposition of himself and seven (7) former co-workers including that of his former immediate supervisor.

The District Court granted respondents' motions for summary judgment and dismissed petitioner's action. The Court specifically found defendants Hamernick and Alwell did not engage in tortious retaliatory conduct towards the petitioner while working as City employees. The District Court stated in its opinion: "The approximate six-month gap between the first maintenance assignment in August and the three maintenance assignments in February is problematic for Wells's claim." (App. B, pg. 18a) The Court concluded: "It seems unlikely that Hamernick having the conscious desire to cause injury to Wells, would abide by the physician's restrictions until February 2001, and then give Wells a series of maintenance assignments." (App. B, pgs. 18a-19a) The District Court did not mention or address the deposition evidence offered in opposition by petitioner in its decision.

Petitioner filed an appeal in the United States Court of Appeals for the Fifth Circuit. That Court affirmed the decision of the lower court. Regarding petitioner's claim for intentional tort, it stated:

"Summary judgment was warranted on the personal injury claim. **There is no direct evidence that the city, through its supervisors, consciously desired that Wells re-injure his knee or knew this result was substantially certain to follow.** There was evidence that Wells was assigned unpleasant cleaning and maintenance assignments and that his efforts to leave for physical therapy were restricted on one or perhaps two occasions, but this evidence is insufficient for a reasonable trier to fact to find that the defendants were trying to re-injure Wells knee, or knew that an injury was substantially certain to follow from their conduct. Defendants offered summary judgment evidence that the job duties of Wellss operator position included cleaning the plant. We further note that the three specific cleaning and maintenance assignments about which Wells complains occurred during periods where his doctors treatment/restriction reports state that his activities were unrestricted. [2] **Evidence that defendants Alwell and Hamernick were angry at Wells or were motivated by a general desire to retaliate against him is not proof of a desire to physically injure Wells.** If the record as a whole could not lead a rational jury to find for the nonmoving party, there is no genuine issue for trial and summary judgment is warranted. *Capital Concepts Props. 85-1 v. Mutual First,*

Inc., 35 F.3d 170, 174 (5th Cir. 1994). There is no evidence that defendants understood the exertion required to cause Wells to re-injure his knee. Wells did not specifically tell defendants that the assignments would cause him to re-injure the knee. [3] Alwell testified in deposition that he thought Wells was physically capable of doing the cleaning. Hamernick testified that he thought Wells could perform the assignments because Wells had told him he could do the work and he had seen Wells jump from the back of boats and run up stairs. **The evidence that defendants intended to cause a physical injury to Wells can at best be described as colorable**. Under modern summary judgment practice, 'there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted.' *Anderson v. Liberty Lobby, Inc.*; 477 U.S. 242, 249-50 (1986) (citations omitted).

[2] Wells complains about cleaning and maintenance assignments he performed on August 11, 2000, February 3, 2001, and February 12, 2001. A February 28, 2000 doctor report limits his activities to "Light duty at 90%," but states that this restriction is only in effect until March 15, 2000. An August 16, 2000 report states

> that he should avoid "consistent maintenance, prolonged standing & janitorial duties," but a September 6, 2000 report states that these restrictions are only in effect until October 18, 2000." (Fn. 3 omitted) (App. A, pgs. 4a-6a) (Emphasis added)

Other than characterizing petitioner's evidence "as merely colorable" or "not significantly probative" the Court of Appeals did not outline a fact intensive review of petitioner's evidence.

In addition, the Court made a factual determination on an issue that was not argued or raised in the District Court, i.e. that petitioner was not under his doctor's restrictions when he was assigned the three (3) specific cleaning and maintenance jobs he complains of.

Believing that the lower courts failed to follow the guidelines set forth by this Court in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505 (1986) of viewing all the evidence in the light most favorable to the party opposing the motion for summary judgment and to draw all reasonable inferences in that party's favor, petitioner has filed this petition. Petitioner also avers that the Fifth Circuit violated this Court's admonishment in *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 120 S.Ct. 2097 that lower courts should not make credibility determinations and weigh the evidence when ruling on Rule 50 motions or motions for summary judgment.

Petitioner also contends that the Court of

Appeals erred in making a factual determination on petitioner's medical restrictions in its opinion, which was an issue that was not considered or argued in the District Court.

STATEMENT OF RELEVANT FACTS

1. Deposition of Chad Wells (App. H)

In 1997, petitioner Chadwick E. Wells, while employed as a millwright for Operational Service, Inc., injured his right knee. (App. H, pg. 54a) He received compensation benefits consisting of supplemental earnings benefits from this injury. These benefits are still ongoing. He subsequently became employed by the City of Alexandria in 1998 as an Operator 1 in the Electric Power Plant. (App. H, pgs. 55a-56a)

On February 1, 2000, he had surgery on his right knee which repaired his anterior cruciate ligament and the medial meniscus. (App. H, pgs. 54a-55a) He was subsequently released by the surgeon, Dr. David Pope, to return to work on light duty. Petitioner's supervisor Alwell informed him he couldn't return back to work on light duty. He then took a job description of Operator 2 to his doctor who released him to perform 90% of the job duties, the restrictions being squatting and kneeling. (App. H, pgs. 58a-59a) In June of 2000, petitioner and Keith White, his former supervisor, went to the Louisiana State Police to report activities of Alwell taking roofing material from a City job after hours. (App. L)

Prior to this time, petitioner's relationship with Alwell had been strained and tenuous. There had been

prior incidences at work involving someone taking the newspaper at the plant, a grievance filed on a wage and hour claim and a dispute about picking up Alwell's lunch.

On at least two (2) occasions, Hamernick and Alwell had refused to allow the petitioner to go to post-surgery physical therapy necessitating the petitioner to report them to the City Director of Personnel, Pam Saurage.

After petitioner reported Alwell's activity to the Louisiana State Police and it was investigated, Hamernick made a threat in front of several employees witnesses in the control room. (App. H, pgs. 62a-63a) Specifically, petitioner stated Hamernick said "It is going to be bad on the operators that had stuff to do with the investigation. That stuff that was going on." He was referring to the roofing material investigation.

On or about August 11, 2000, petitioner was ordered by his shift supervisor Barry Tyler to strip and wax the floor. This was not a primary duty listed in the operator's job description. (Ex. N) *[1] After petitioner balked because of his knee problem, Hamernick specifically told him he had to do it or go home if he refused. Petitioner called Sonny Craig, City Director of Utilities and told him the job assignment was against his doctor's restrictions. Petitioner testified that Alwell told petitioner directly that he gave the order to Hamernick to give to Barry Tyler for him to strip and

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[1]* Exhibits attached to Petitioner's Opposition to Defendants' Motions for Summary Judgment.

wax the floor. (App. H, pgs. 57a-58a) Later, Alwell called petitioner in his office in January of 2001 to tell him he would have to be able to perform 100% of his job duties to continue on the job. This was contrary to the City's policy of 90%. (App. P) Later, Hamernick ordered petitioner to clean inside of a hot well at the bottom of the turbines on February 3rd. The hot well chamber is not large enough for a man to stand up in. As a result of doing this, petitioner aggravated his knee, causing it to swell. According to Alwell, Hamernick was acting on his orders when he gave the order. On February 12th, petitioner was ordered to go into the condenser unit and check the tube for leaks. This job required him to squat and the opening was very difficult to get in. As a result of going in the condenser, petitioner twisted his right knee coming in and out trying to get back on the ladder because of the small entrance hole. It was the same knee that had been operated on. As a result of each of the instances, petitioner sustained an onset of pain in his knee necessitating medical treatment. Alwell told petitioner he gave all the orders to Hamernick. (App. H, pgs. 59a-60a)

2. **Deposition of Gerard Alwell (Ex. B)***

Mr. Alwell is a Plant Superintendent for the Electric Production Plant for the City of Alexandria. He has been employed there for twenty-five (25) years. (Ex. B, pg. 6)* Alwell was contacted by a Louisiana State Police detective investigating a report of theft of the roofing material. They went to his house in Deville where Alwell had the materials stored behind his house. Alwell was later contacted and told the investigation was over and that no wrongdoing was

found. (Ex. B, pg. 24)* Alwell didn't know if any complaint was filed with the Louisiana Board of Ethics.

Alwell admitted during and after the investigation that he asked other employees what was going on. He didn't recall which employees he asked. (Ex. B, pg. 27)* He doesn't remember asking any employees who reported him to the State Police for taking the red roofing material. Before he was told by the State Police the investigation was over, he talked to Keith White, who admitted that he was the one who had filed the report. Alwell also had advised Sonny Craig of the investigation and Craig told him Wells and Jerry Sampract had come to his office and discussed the situation. This was prior to the investigation was being concluded. (Ex. B, pg. 29)*

Alwell was aware that Wells had surgery. (Ex. B, pg. 33)* He doesn't know what brought about the surgery. Alwell doesn't remember if there was a question of whether Wells could perform all his duties. (Ex. B, pg. 37)* He doesn't remember if he got involved in the questions about petitioner's doctor excuses, work restrictions and 90% of his work. (Ex. B, pg. 37)* He doesn't remember the specific restriction report of the doctor dated February 28th. (Ex. B, pg. 39)* He stated that the City does not have a light duty policy. He would have to be released for 90% of his job duty. Alwell didn't recall seeing a copy of any letter that Ms. Saurage wrote to the doctor. He was not familiar with the memo of Ms. Saurage about employees being able to perform 90% of job duties to be allowed to return to work. (Ex. B, pg. 41)* He doesn't remember seeing the reply from the doctor about Mr. Wells being able to do 90% of his job duty. He denied

telling Wells that if he wasn't able to come back 100%, he couldn't work at the power plant. He does not remember the specifics of the doctor's restrictions. (Ex. B, pg. 45)* He remembers the doctor's statement on 8/16/00 saying to avoid maintenance, prolonged standing and janitorial duties. Alwell said he thought Wells' conception was that Wells didn't want to do any maintenance or janitorial duties. He said that the revised doctor's restrictions said only "avoid." It didn't say he couldn't do it. (Ex. B, pg. 47)* The way Alwell perceived it, Wells didn't think it was part of his job and he shouldn't be doing that type of job. He thinks that Wells could do squatting and kneeling at one point. He doesn't remember getting a doctor's statement saying he couldn't do that. He testified that he was not aware that Wells was assigned duties that required him to kneel and squat. He was not aware that petitioner was assigned duties that doctors had told him to avoid. (Ex. B, pg. 48)* After the fact, Mr. Hamernick told him about the incident of August 11th. Alwell agreed with Hamernick's actions and Craig's actions and that was if petitioner couldn't do the work, he ought to go home and he would be relieved from his duties for that day. He said that going home not mean Wells would be fired. He did not talk to Wells about it. He did not intervene. He does not know if Wells performed the duties or had any physical consequences to his knee by performing the duties. He does not remember talking to Wells about Dr. Pope's restrictions of August 16th. He does not remember talking to Wells about what prompted that doctor's report of August 16th. He did not tell any employees that he would get even with those employees who reported him and caused the State Police investigation to occur. (Ex. B, pg. 52)* He remembers telling Wells that he had to have a full

release, meaning 90% of the job duties with no restrictions. (Ex. B, pg. 56)* He stated he did not say 90%. He said full release.

In his opinion, Wells was capable of working in the hot well and cleaning the hot well in February of 2001. (Ex. B, pg. 57)* That was based on his doctor's release that Wells was able to do 90% of his job duty. Alwell believed that Wells was able to do 90% of the job duties in some relative form. (Ex. B, pg. 58)* He didn't see any problem with him in getting in the hot well to clean it from a physical standpoint based on the medical information he had. He would not have taken any different action had he been informed of that. (Ex. B, pg. 59)* He did not talk to Wells or try to make any effort to retain him when Wells resigned.

3. **Deposition of John Hamernick, Jr. (Ex. C)***

Hamernick was a Plant General Supervisor. (Ex. C, pg. 6)* He supervised shift supervisors, maintenance supervisors, employees directly underneath him, electricians, instrument techs and environmental techs. There was approximately twenty (20) employees at the power plant full-time. He never told petitioner he had to be 100% to continue working for the City as Operator 2. (Ex. C, pg. 31)* Hamernick stated he told petitioner that at any point if there was a problem, let him know and we would work through it. He told him this shortly after petitioner returned to work.

He testified that petitioner had to have therapy when he came back. He was aware of one instance when petitioner had a problem getting off work to go to

post-surgery therapy. He worked with petitioner on numerous occasions and made every possible attempt to get him to therapy. The shift supervisor on duty, myself and Alwell were involved in this discussion. (Ex. C, pg. 33)* Does not recall refusing him to take off of work to go to therapy because of conflict in work schedule. (Ex. C, pg. 34) * He testified that Craig contacted him and said that petitioner had called him and Craig asked Hamernick to see about the situation. He stated he worked in petitioner's place twice so he could go to therapy after Craig's call. (Ex. C, pg. 35)* He stated that petitioner had a slight limp.

He did not know that he was subject of State Police investigation. He learned close to the end of the investigation that Alwell was a subject of the investigation. (Ex. C, pg. 36)* He never told any employees that he and Alwell were going to get even with them. "Had a good working relationship with all the employees." (Ex. C, pg. 38)* He knows no reason why employees would make up stories about him. (Ex. C, pg. 42)* He testified he never told petitioner not to go over his head. The City has an open door policy. He told the supervisor to use chain of command. (Ex. C, pg. 43)* Petitioner had not contacted Hamernick about therapy. Hamernick never turned him down for therapy. (Ex. C, pg. 44)* He got a call from Craig about Chad's ability to strip and wax the floor. He never talked to Wells before that call about his restrictions. Craig's call was the first time any question arose. He did and filed an injury report. (Ex. Q; Ex. C, pg. 60)* He never told Wells he had to perform 100% or go home. He did not order petitioner into a hot well to clean it. He did not order petitioner into the condenser. He instructs the shift supervisors. He was present

when he was doing work in condensers and sitting on the stool and standing upside of the condenser with no complaints. He described the condenser. He turned down petitioner's vacation request of 8/13/01. Petitioner did not tell Hamernick he was hurting. He doesn't recall telling petitioner no light duty existed at the plant. Alwell never gave him an order to assign Wells individually. He was floored when Wells resigned.

In addition to the above depositions, petitioner relies on the testimony of a number of his former co-workers who contradict the testimony of defendants Hamernick and Alwell. These depositions are attached as exhibits to this opposition. They were not referred to by the District Court in its opinion.

4. **Deposition of Darren Sigur (App. I)**

Darren Sigur, the Shift Supervisor of petitioner, testified that on occasions, an Operator 2 cleaned in the hot well. He would not say it was a "regular part of the job." He testified it was a maintenance function and they assisted maintenance. It was normally done when the plant was not generating electricity. (App. I, pgs. 64a-65a) When the plant was not running, they assisted maintenance in cleaning, painting, making rounds and checking on equipment. (App. I, pgs. 65a-66a) If need be, check the condenser and strip and wax the floor. Operator 1 was outside the control room when the plant was running. (App. I, pgs. 66a-67a) He recalls an incident where petitioner complained about his knee giving him a problem after working in the hot well. Wells and Lannis Day were working in the condenser. He complained several times about his knee giving him a problem. He showed Sigur his knee was swollen.

(App. I, pgs. 67a-68a) He said on two (2) occasions, petitioner showed him his knee. He did an injury report one time. He talked to Hamernick who told him to fill out an injury report. (App. I, pgs. 69a-70a) Wells told Sigur that his limitations imposed by the doctor were bending, stooping, no crawling around on his knees and no long-standing. (App. I, pgs. 70a-71a) Sigur said he reported to Hamernick and Alwell that Wells felt he was not able to do that part of his job because of his knee and the buffer was causing problems with his leg. Alwell said that if he couldn't perform his job duties, he could always go home. Sigur reported that comment to Wells. Sigur testified that both Hamernick and Alwell specifically requested that he, Sigur, assign duties to Mr. Wells either cleaning the condenser of the hot well or stripping and waxing the floor. (App. I, pgs.71a-73a) He specifically remembers both of them telling Wells to work in the condenser after his surgery. They mentioned Chad by name. They wanted him to do it. Sigur said when he is the operator, he never cleaned the hot well and he has been an employee since 1982. He said that Hamernick and Alwell were aware of Chad's medical restrictions. (App. I, pgs. 73a-74a) Sigur also testified that he was questioned by Mr. Alwell about the State Police investigation and he mentioned Chad Wells and Jerry Sampract's name. He said that the relationship between Alwell and Wells was strained. He also described the work in the condenser. You would have to crouch and fit in there the best way you can to get to the tubes you needed to get to. It was congested and tight. (App. I, pgs. 74a-75a)

5. **Deposition of Lannis Day (App. J)**

Mr. Day testified that he had been an Operator

for the City of Alexandria since 1988. Mr. Day testified that the job duties that specifically hurt petitioner's knee were cleaning out the hot well, working in the condenser and also mopping and waxing the floors. (App. J, pgs. 75a-76a)

He indicated that the hot well is "real close quarters" and to get into it, you had to be on your knees because you couldn't stand up. He indicated that petitioner complained about his leg because of his surgery. Checking the tubes on the condenser he stated was another job that was confined where you couldn't stand up and it was an awkward place to work. He saw petitioner's knee swollen after he performed that job. (App. J, pgs. 77a-78a) He confirmed that petitioner was told to either do the job about waxing the floor or go home. (App. J, pgs. 78a-79a) Mr. Day testified that petitioner complained to Darren Sigur, the Shift Supervisor, about his knee after the condenser and the hot well.

In Mr. Day's opinion, petitioner was a good operator and a good worker. He stated there were other employees that had been injured and had returned to work even though they were on crutches and not able to perform physical parts of their job.

On examination by petitioner's counsel, Mr. Day stated he never saw an operator strip and wax the turbine floor while the plant was running. (App. J, pgs. 79a-80a) Mr. Day testified that Alwell asked him about the State Police investigation. (App. J, pgs. 82a-83a) He also stated that Hamernick told him in front of petitioner and Floyd McFarland that the employees involved in the State Police investigation were going to

suffer a "trickle down effect." Day assumed that Hamernick was saying he was going to get even with the employees involved. (App. J, pgs. 81a-82a)

6. **Deposition of Jerry Sampract (App. K)**

Jerry Sampract, a former Operator 2, indicated that he was aware of instances involving petitioner complaining of knee pain related to him having to work in the condenser and hot well units. (App. K, pgs. 83a-84a) He said that Wells and Mr. Alwell did not have the best of relationships. (App. K, pgs. 84a-85a) He testified that he took the pictures of Alwell taking the roofing material. (App. K, pgs. 85a-86a) He indicated that it was "total war" between petitioner and Hamernick and Alwell.

7. **Deposition of Keith White (App. L)**

Keith White was a Shift Supervisor. Mr. White testified that he and Wells reported Alwell's actions to the State Police. Chad went with him. (App. L, pgs. 87a-88a) He also indicated that petitioner told him that his knee would swell as he was stripping and waxing the floor. Mr. White saw the swelling.

Mr. White testified that Alwell asked him about the State Police investigation. He said Alwell was "mad about it." (App. L, pgs. 89a-90a) His conversation with Alwell took place after the investigation was concluded. Hamernick was present during the discussion of the investigation. Alwell had called Mr. White to his office while he was on duty. He said that Hamernick and Alwell told him a lot of people were "mad" about the investigation. (App. L, pgs. 90a-92a) The purpose of the

meeting was in Alwell's office to find out what White knew about the investigation. Mr. White testified he did not mention petitioner. He testified that both Hamernick and Alwell told him they thought that petitioner, Mr. White and Jerry Sampract had instigated the investigation. (App. L, pgs. 92a-93a) Alwell was very upset about the investigation. "He was mad." (App. L, pgs. 93a-94a) Hamernick was flabbergasted that White would even instigate the investigation. White testified that he had been a supervisor for seventeen (17) years and during that time, he was not aware of any employees ever being called in on their off day to strip and wax a floor as petitioner was in August. In describing the condenser, White stated that on one side you could stand up and the other side was very cramped. You had to crouch or sit or kneel down. You couldn't stand up. He stated there was a very tense atmosphere between petitioner, Hamernick and Alwell. He said that Wells left because of the friction between him and his supervisors, the individual defendants, Hamernick and Alwell. (App. L, pgs. 94a-96a)

8. **Deposition of David Reed (App. M)**

He was a former employee for the City of Alexandria for fourteen (14) years as an Electrician at the power plant. His immediate supervisor was John Hamernick. He was familiar with the fact that petitioner had surgery on his knee. He knew Wells when he worked at the plant. He was aware of the State Police investigation. He was contacted by a State Police detective and questioned. Alwell asked Reed if he had seen pictures of him loading some of the material. Reed told him he had, but didn't tell him who

showed him. (App. M, pgs. 96a-97a) Alwell came down to the electric shop and questioned Reed. Later in the control room, Alwell indicated some language about retaliation similar to "If ya'll want to play, we will play." (App. M, pgs. 97a-99a)

Reed was a witness when Hamernick told Wells that he was instructed to strip and wax the floor. Hamernick said if you don't strip and wax the floor, I have been instructed to let you go. (App. M, pgs. 99a-100a) Reed testified that while petitioner did not consider the job assignments to be part of his job, he was more concerned with the well-being of his knee. (App. M, pgs.110a-101a) Hamernick told petitioner's then supervisor, Barry Tyler, to have petitioner strip and wax the floor. He stated that petitioner attempted to do it.

9. **Deposition of Larry McGuirt (App. N)**

Mr. McGuirt was a former employee of the City of Alexandria Electric Power Plant having been employed for twenty-one (21) years. He retired in March of 2001. He was an Instrument Tech.

He testified he was aware of Mr. Wells' stripping and waxing the turbine floors. He stated when the evening shift came on, Darren Sigur was given instructions to have the petitioner strip the floor when he came on. Those instructions were given by defendant Hamernick. Sigur told Hamernick that he would have his crew take care of it and Hamernick said no "they wanted Chad to do that." (App. N, pgs. 101a-102a) This conversation took place in the control room. McGuirt said he had never heard Hamernick give

instructions to a shift supervisor and select an employee to do a particular task. This occurred after petitioner's surgery. (App. N, pgs. 101a-102a)

10. **Deposition of Floyd McFarland (App. O)**

Mr. Floyd McFarland, a present employee to the City of Alexandria Electric Power Plant as an Operator 1, testified that he came to work and saw petitioner waxing the floor. Petitioner showed him his knee which was swollen. Mr. McFarland said it wasn't appropriate for an operator to be stripping and waxing the turbine floor while the plant was running. The City had millions of dollars of equipment that needed to be monitored. (App. O, pgs. 102a-104a) McFarland testified that Alwell questioned employee, Lannis Day, about the State Police investigation and then Hamernick asked Day about the investigation in front of McFarland and petitioner. (App. O, pgs. 104a-106a) Hamernick stated that those operators who participated in the investigation were going to suffer a "trickle down effect." McFarland took this to mean that he was going to get even. (App. O, pgs. 106a-107a)

REASONS FOR GRANTING THE PETITION

2. Failure to follow this Court's guidelines in deciding summary judgment.

In the instant case, the Court of Appeals did not follow the guidelines set forth by this Court in *Anderson, supra* and *Reeves, supra.* The lower courts failed to give any weight to petitioner's own sworn testimony and the sworn deposition testimony of seven (7) former co-employees including petitioner's former

immediate supervisor. None of that evidence was construed by those courts in a light most favorable to the petitioner. They did not address in a fact intensive manner the nature and extent and quality of petitioner's evidence.

For instance, petitioner's former immediate supervisor testified that both individual defendants, Alwell and Hamernick, were aware of petitioner's medical restrictions when they ordered Wells to strip and wax the floor in August. (App. I, pgs. 73a-74a) The supervisor Darren Sigur also testified he reported to defendants, Alwell and Hamernick, that Wells stated he was unable to perform stripping and waxing because of problems with his knee. Despite this knowledge, according to Sigur, both Alwell and Hamernick, specifically ordered Sigur to assign duties to Wells that they were advised that Wells couldn't do. (App. I, pgs. 68a-74a)

The evidence also shows that Alwell ordered Keith White, a co-employee of petitioner, to his office and interviewed him in front of Hamernick about White's part in the State Police investigation of Alwell and Hamernick. According to White, Alwell was "upset and mad" about being the subject of the investigation and stated that he believed that Wells was one of those involved. (App. L)

The evidence offered by petitioner shows that Hamernick told petitioner in front of two (2) other employees, Floyd McFarland and Lannis Day, that he and Alwell were going to get even with those employees who initiated the investigation. All three (3) testified under oath to this fact. (App. H, O & J)

Hamernick denied this in his deposition.

All of this testimony flies directly in the face of the statement by the Court of Appeals in its opinion that "there is no direct evidence that the City, through its supervisors, consciously desired that Wells re-injured his knee or knew this result was substantially certain to follow."

Additionally, the Court of Appeals found that the evidence of individual respondents were angry at Wells or motivated by general desire to retaliate against him, was not proof of a desire to physically injure Wells. Petitioner submits that whether the individual respondents recognized that the exertion required in the jobs assigned Wells would aggravate his knee condition, is a question for the jury to decide. While the Court of Appeals stated that the individual defendants testified they believe Wells was physically capable of doing the cleaning, there is contrary evidence showing they were told that he was not capable of doing the cleaning and were aware of his doctor's restrictions.

The Court of Appeals characterized all of petitioner's evidence as "colorable" and "not significantly probative." In doing so, it made credibility determinations, weighed the evidence and drew inferences from the facts, all functions prohibited by this Court in *Anderson, supra.*

Moreover, the lower courts resolved the disputed fact of motivation at the summary judgment stage which this Court has found in certain cases to be erroneous. *Hunt v. Cromartie*, 526 U.S. 541, 119 S.Ct.

1545, 143 L.Ed.2d 731 (1999)

Petitioner contends there is sufficient evidence to draw the inference that defendants consciously desired the results of their actions in ordering petitioner to perform job duties that would aggravate his post-surgery knee while he was in the process of recovering from surgery.

In *International Shortstop, Inv. v. Rally's, Inc.*, 939 F2d 1257, 1265-66 (5th Cir. 1991), *cert.den.* 502 U.S. 1059, 112 S.Ct. 936, 117 L.Ed.2d 107 (1992), the court detailed why summary judgment usually is inappropriate for issues involving state of mind. The court stated:

> "When the state of mind is an essential element of the nonmoving party's claim, it is less fashionable to grant summary judgment because a party's state of mind is inherently a question of fact which turns on credibility. Credibility determinations, of course, are within the province of the fact-finder....Only through *live* cross-examination can the fact-finder observe the demeanor of a witness and assess his credibility. A cold transcript of a deposition is generally no substitute because it cannot unmask the veracity of a testifying witness clad in a costume of deception; it cannot unveil that a seemingly well-groomed witness is coming apart at the seams; 'that he fidgets when answering critical questions, his eyes shift from the floor to the ceiling,

> and he manifests all other indicia traditionally attributed to perjurers.'"

The court went on to clarify that where intent or state of mind is an issue, summary judgment may be appropriate if a party rests on conclusionary allegations and probable inferences and unsupported speculation. That is not the situation in the instant case. There is evidence presenting genuine issues of material fact that preclude summary judgment in this matter.

Intent is a fact-sensitive determination and not appropriately determined in a motion for summary judgment. *In Re: Combustion, Inc.*, 960 F.Supp. 1076, 1081 (W.D. La. 1997) Summary judgment is seldom appropriate for determinations based on subjective facts, such as motive, intent, good faith, knowledge and malice. *Bruce v. Cleggett-Lucas, M.D.*, 2003 WL 1733530 (E.D. La. 2003), *Hunt, supra.*

In *Swope v. Columbian Chems. Co.*, 281 F.3d 185 (5th Cir. 2002), the Fifth Court reversed a summary judgment in favor of the employer in a Louisiana intentional tort case in light of competent evidence of intent. In that case, the Court stated that where a state of mind was an essential element of the non-moving party's claim, summary judgment was usually not appropriate because a party's state of mind is inherently a question of fact which turns on credibility.

Petitioner submits the lower courts erred as a matter of law in not following this Court's guidelines as set forth in *Anderson, supra* and granting the respondents' motions for summary judgment.

3. Court of Appeals erred in affirming summary

judgment on a factual issue not raised in District Court.

In its decision, the Court of Appeals made a factual determination that when the three (3) specific cleaning and maintenance assignments were given to petitioner, his work activities were unrestricted by his treating doctor. (App. A, pg. 7a, FN. 2 of Opinion)

Prior to oral argument before that Court, it had never been disputed or argued by any of the defendants that Wells was not under post-surgery restrictions during the entire time he worked for the City after returning to work from his knee surgery in February of 2000. At this stage of the proceedings, petitioner's medical status was not a contested issue and it had not been fully developed. Only a portion of the medical records were in the record. The Statements of Uncontested Facts submitted by the defendants in support of their motions showed that petitioner was under some medical restrictions at all times herein. See also opinion of District Court stating that supervisors had abided by petitioner's doctor's restrictions since petitioner had returned to work. (App. B, pgs. 18a-19a)

During oral argument on April 6, 2004 for the first time in this litigation, a question arose whether petitioner's physical restrictions of his job duties imposed on him by Dr. Pope were in effect when he was ordered by defendant Hamernick on August 11th to strip and wax the floor. A representation was made by counsel for defendants that petitioner's work restriction by Dr. Pope had expired by its very terms on March 15th. See Treatment and Restriction Report dated February 28th of Dr. Pope. This was the first

time any party had made this argument either in the lower court or in brief before the Court of Appeals.

Since the medical in this case had not been fully developed prior to the filing of defendants' motions for summary judgment, petitioner attempted to supplement the record with a certified copy of all of Dr. Pope's medical records which clearly showed that petitioner was under and remained
under medical restrictions regarding his work the whole time he worked for the City of Alexandria after his surgery until his resignation. The Court of Appeals denied that motion. (App. E)

It is petitioner's position that the issue of whether petitioner was on medical restrictions when he was assigned the cleaning and maintenance jobs he objected to, should not have been reached and decided on appeal. Defendants had not raised this issue before in the District Court nor was it briefed before the Court of Appeals.

In *Topalian v. Ehrman*, 954 F.2d 1125, 1131, n.10 (5th Cir. 1992), reh. den., 961 F.2d 215 (5th Cir. 1992), cert. den., 506 U.S. 825, 113 S.Ct. 82 (1992), the court held that an appellate court's inquiry is limited to the summary judgment record before the trial court and parties may not advance new theories or raise new issues on appeal.

In *FDIC v. Laguarta*, 939 F.2d 1231 (5th Cir. 1991), the court opined:

> "We hold that it would not be proper under the circumstances of this case to

> affirm a summary judgment on these grounds that were neither raised below by the Receiver [FDIC] nor even raised *sua sponte* by the district court. It is true that we may affirm a summary judgment on a ground not relied upon by the district court. This Court has clearly held, however, that it will generally not consider a new ground on appeal raised by an appellant in opposition to summary judgment. The same should apply to new grounds raised by ~~an~~ appellee in defense of summary judgment where the parties were not afforded an opportunity to develop the issue below, and it was not implicit or included in the issues or evidence tendered below, so that the party was not on notice of the need to meet it, and the record appears not to be adequately developed in that respect. *Laguarta*, 939 F.2d at 1240 (citations omitted)."

It is petitioner's position that the Court of Appeals erred in allowing counsel for defendants to raise a new issue at oral argument that was not previously argued to the District Court and was contradicted by their own Statements of Uncontested Fact.

Additionally, after defendants raised this issue during oral argument for the first time, the Court of Appeals erred in not allowing petitioner the opportunity to supplement the record to offer evidence on this issue. Then, after denying petitioner's motion,

the Court of Appeals proceeded to make a factual determination on that issue in its opinion in support of its decision. It did this even though petitioner had not been given the opportunity to respond to that issue which had not been raised below. It proceeded to make an adverse factual determination concerning petitioner's medical restrictions. This determination was made contrary to the above cited jurisprudence and the testimony by the petitioner and Sigur that defendants knew of petitioner's medical restrictions regarding his job duties after his surgery. Moreover, as shown by Dr. Pope's medical records, the factual determination of the Court of Appeals was false and inaccurate.

CONCLUSION

The Petition for Writ of Certiorari should be granted. The opinions of the lower courts conflict with the holding and guidelines set forth by this Court in *Anderson* and *Reeves*. Petitioner requests that this Court grant this petition to again reiterate the uniform guidelines it previously gave to the lower courts in *Anderson*. Additionally, the question of the Court of Appeals considering and deciding an issue not raised in the District Court below while denying petitioner an opportunity to rebut that issue, merits consideration by this Court.

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(any footnotes trail end of each document)

No. 03-30750

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
CHADWICK E. WELLS,
Plaintiff-Appellant,

versus

CITY OF ALEXANDRIA; JOHN HAMERNICK;
WILLIAM GERARD ALWELL,
Defendants-Appellees.

April 29, 2004, Filed

JUDGES: Before KING, Chief Judge, REAVLEY and EMILIO M. GARZA, Circuit Judges.

OPINION: PER CURIAM: *

The summary judgment in favor of defendant-appellees is affirmed, for the following reasons:

1. Insofar as plaintiff-appellant Chadwick Wells' petition can be construed as asserting a disability discrimination claim under federal or state law, the district court rejected these claims for various reasons, and Wells does not challenge these rulings. On appeal Wells maintains that he never asserted a federal claim. If a state disability discrimination claim was ever alleged, it is abandoned on appeal. See Johnson v. Puckett, 176 F.3d 809, 814 (5th Cir. 1999).

2. Wells alleged a retaliation claim for reporting that defendant and plant superintendent Gerard Alwell had taken roofing material for personal use. We agree with the district court that summary judgment on this claim was warranted. Louisiana has a whistleblower statute, La. Rev. Stat. Ann. § 23:967 (West 1998), which allows a private suit for violation of its provisions. The statute provides that "an employer shall not take reprisal against an employee who in good faith, and after advising the employer of the violation of law . . . discloses or threatens to disclose a workplace act or practice that is a violation of state law." (Emphasis added). This statute by its terms requires the employee to advise the employer of the violation of law before reporting it to outside authorities, and there was no evidence that Wells so advised his employer, defendant City of Alexandria.

3. We also agree with the district court that for the Louisiana whistleblower statute to protect the employee, the employer "must have committed a violation of state law." Puig v. Greater New Orleans Expressway Comm'n, 772 So. 2d 842, 845 (La. Ct. App. 2000) (internal quotation marks omitted). While Wells questions the correctness of Puig, we generally defer to the holdings of lesser state courts unless we are convinced that the state supreme court would rule otherwise. See United States v. Johnson, 160 F.3d 1061, 1063-64 (5th Cir. 1998). The district court reasoned that the state police found no violation of state law. The summary judgment record shows that there was no theft because the contractor who supplied the roofing material had told Alwell that the extra roofing material was going to be thrown away and that city employees could have it. Wells does not now argue otherwise.

4. Insofar as Wells contends that a violation of state law nevertheless took place because Alwell accepted a gift of roofing material in violation of state law, La. Rev. Stat. Ann. § 42.1115(B) (West 1990) provides that no public employee may accept "any thing of economic value as a gift or gratuity" from a person "if such public employee knows or reasonably should know that such person. . . conducts operations or activities which are regulated by the public employee's agency" or "has substantial economic interests which may be substantially affected by the performance or nonperformance of the public employee's official duty." Wells does not point to summary judgment proof that the agency employing Alwell--the city electric department--regulates roofing contractors, n1 or that Alwell's official duties could have had a substantial effect on substantial economic interests of the roofing contractor. Wells also failed to offer proof that the roofing material, which the roofing contractor treated as refuse, had economic value. Wells fails to demonstrate that § 42.1115(B) applies.

5. Wells alternatively argues that under La. Rev. Stat. Ann. § 42.1169(B) (West Supp. 2004), "any public employee who reports to a person or entity of competent authority or jurisdiction information which he reasonably believes is a violation of any law . . . shall be free from discipline or reprisal for reporting said acts of alleged impropriety." This statute only requires a reasonable belief that a violation of law occurred. However, we do not believe that Wells has a private cause of action under state law for violations of section 42.1115(B) or section 42.1169(B). These provisions are part of the Code of Governmental Ethics, which

establishes a Board of Ethics and an administrative procedure for hearing ethics complaints. Id. §§ 42.1132, 42.1141 (West Supp. 2004). This Code does not provide a private cause of action for government employees, except that a court may enforce an order or decision of the Board, id. § 1135, and that appeals of these administrative decisions may be made to First Court of Appeal, id. § 1142. See Nolan v. Jefferson Parish Hosp. Serv. Dist. No. 2, 790 So. 2d 725, 732 (La. Ct. App. 2001) ("Jurisdiction to enforce the Code of Governmental Ethics lies in the Board of Ethics. We find no provision of any private right of action under the Code of Governmental Ethics; the employee's remedy is to complain to the Board of Ethics, which then investigates and takes action to protect the employee, if appropriate.") (citation and footnotes omitted). We also note that section 1169(C) expressly provides that any public employee who is suspended, demoted, or dismissed in violation of section 1169 "shall report such action to" the Board of Ethics.

6. Wells also asserted a personal injury claim based on injury to his knee. The district court correctly held that workers' compensation is Wells's exclusive remedy against defendants for work-related injuries unless the injuries resulted from an intentional act. See La. Rev. Stat. Ann. § 23:1032 (West 1998). The employer acts intentionally if he "1) consciously desires the physical result of his act, whatever the likelihood of that result happening from his conduct; or 2) knows that the result is substantially certain to follow from his conduct, whatever his desire may be as to that result." Reeves v. Structural Preservation Sys., 731 So. 2d 208, 211 (La. 1999) (internal quotation marks omitted). Summary judgment was warranted on the personal injury claim.

There is no direct evidence that the city, through its supervisors, consciously desired that Wells re-injure his knee or knew this result was substantially certain to follow. There was evidence that Wells was assigned unpleasant cleaning and maintenance assignments and that his efforts to leave for physical therapy were restricted on one or perhaps two occasions, but this evidence is insufficient for a reasonable trier to fact to find that the defendants were trying to re-injure Wells' knee, or knew that an injury was substantially certain to follow from their conduct. Defendants offered summary judgment evidence that the job duties of Wells's operator position included cleaning the plant. We further note that the three specific cleaning and maintenance assignments about which Wells complains occurred during periods where his doctor's treatment/restriction reports state that his activities were unrestricted. n2 Evidence that defendants Alwell and Hamernick were angry at Wells or were motivated by a general desire to retaliate against him is not proof of a desire to physically injure Wells. [*8] If the record as a whole could not lead a rational jury to find for the nonmoving party, there is no genuine issue for trial and summary judgment is warranted. Capital Concepts Props. 85-1 v. Mutual First, Inc., 35 F.3d 170, 174 (5th Cir. 1994). There is no evidence that defendants understood the exertion required to cause Wells to re-injure his knee. Wells did not specifically tell defendants that the assignments would cause him to re-injure the knee. n3 Alwell testified in deposition that he thought Wells was physically capable of doing the cleaning. Hamernick testified that he thought Wells could perform the assignments because Wells had told him he could do the work and he had seen Wells jump from the back of boats and run up stairs. The evidence

that defendants intended to cause a physical injury to Wells can at best be described as colorable. Under modern summary judgment practice, "there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-50, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986) [*9] (citations omitted).

8. Wells also argues that he raised a fact issue on whether he was constructively discharged. Under federal law, the constructive discharge doctrine [*10] is an alternative way of proving an adverse employment action in Title VII and other cases, but constructive discharge is not itself a cause of action. It is a means of proving the element of an adverse employment action where the employee quits instead of being fired. Wells does not persuade us that Louisiana law is different from federal law in this regard. If there is no cause of action for the reasons discussed above, proving a constructive discharge alone does not entitle Wells to relief. Similarly, although the petition alleges a "hostile work environment," Wells does not persuade us that Louisiana law recognizes a separate tort for hostile work environment, independent of the disability discrimination, whistleblower, and intentional personal injury claims which fail for the various reasons discussed above.

AFFIRMED.

- ---------- Footnotes ----------

* Pursuant to 5TH CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

n1 Wells states in his appellate brief that "in his deposition, Alwell testified it was part of his job duties as Power Plant Superintendent to monitor the work of the roofing contractor from whom he received the material." The fact that a plant superintendent might monitor a roofing job at one plant does not, in our view, mean that roofing contractors "are regulated by the public employee's agency" under section 1115(B).

n2 Wells complains about cleaning and maintenance assignments he performed on August 11, 2000, February 3, 2001, and February 12, 2001. A February 28, 2000 doctor report limits his activities to "Light duty at 90," but states that this restriction is only in effect until March 15, 2000. An August 16, 2000 report states that he should avoid "consistent maintenance, prolonged standing & janitorial duties," but a September 6, 2000 report states that these restrictions are only in effect until October 18, 2000.

n3 Wells did testify that with respect to one of the cleaning assignments, he had told Sonny Craig, the City Director of Utilities, that "it was against my doctor's excuse," and that Hamernick then called Wells and told him "to do it or go

home." Hamernick, however, testified that Wells "told me he could do the task and he went to it.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
ALEXANDRIA DIVISION

CIVIL ACTION NO. 01-1686 SECTION "A" (JUDGE LITTLE)

CHADWICK E. WELLS
-vs-
CITY OF ALEXANDRIA, GERARD W. ALWELL and JOHN HAMERNICK

MEMORANDUM

The defendants John Hamernick, the City of Alexandria, and Gerard A. Alwell move for summary judgment on the plaintiff Chadwick E. Wells's complaint [Doc. Nos. 68, 72, 751. Plaintiff opposes the motions of the defendants. For the reasons explained below, the motions for summary judgment filed by the three defendants are GRANTED.

BACKGROUND

The defendants' motions for summary judgment arise out of the lawsuit the plaintiff, Chadwick E. Wells ("wells"), has brought against the City of Alexandria ("City"), Gerard W. Alwell (" Alwell"), and John Hamernick (" Hamernick") . Wells, Alwell, and Hamernick were employed by the City's Electric Production Department during the time of the events that give rise to this litigation. The plaintiffs complaint alleges that when he returned to work on 8 March 2000 after undergoing knee surgery, Alwell and Hamernick,

who served in supervisory positions, harassed Wells and engaged in acts that created a hostile work environment. These acts included preventing Wells from attending necessary physical therapy sessions, assigning Wells work that he had been advised by his physician not to perform, and suggesting to Wells that he would be terminated if he did not comply with Alwell's and Hamernick's orders, despite Wells's physical limitations. Plaintiff further alleges this harassment was done in retaliation for Wells's reporting improper conduct by Alwell to a state law enforcement agency. As a result of the missed therapy sessions and physically demanding work assignments, Wells reinjured his knee and sustained additional pain and suffering in February of 2001. He resigned from his position with the City in April 2001. Plaintiff filed this suit against the City, Alwell, and Harnernick in August of 2001.

DISCUSSION

Plaintiff Wells is a resident of Alabama. The defendants are all Louisiana citizens. Jurisdiction of this claim is proper under 28 U.S.C. § 1332.
Standard of Review

Summary judgment may be granted to the moving party only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, when viewed in the light most favorable to the non-moving party, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56; Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-50 (1986). A dispute about a material fact

is genuine if the evidence is such that a reasonable jury could return a verdict for the non-moving party. Anderson, 477 U.S. at 248. In making this determination, a court must draw all justifiable inferences in favor of the non-moving party. Id. at 255. Once the moving party has shown "that there is an absence of evidence to support the non-moving party's case," the non-moving party must come forward with "specific facts" showing a genuine factual issue for trial. Fed. R. Civ. F. 56; CelotexCorp. v. Catrett, 477 U.S. 317, 325 (1986); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). Conclusory denials, improbable inferences, and legalistic argumentation are not an adequate substitute for specific facts showing that there is a genuine issue for trial. S.E.C. v. Recile,10 F.3d 1093, 1097 (5th Cir.1993).

Americans with Disabilities Act claim

Defendants move for dismissal of Wells's claims based upon the Americans with Disabilities Act ("ADA"). 42 U.S.C. § 12101 et seq. Under the ADA, an employee must first file a complaint with the EEOC or with the appropriate state or local agency prior to bringing a claim in federal court. See Dao v. Auchan Hypermarket, 96 F.3d 787, 789 (5th Cir. 1996) (citing 42 U.S.C. § 2000e-5 (e) (1)) . Wells has not filed a complaint with the EEOC or with a state or local agency authorized to deal with alleged employment law violations. Defendants assert, therefore, that Wells's ADA claim must fail.

In his memorandum opposing summary judgment, Wells maintains that he does not rely upon the ADA in

his complaint. His claims, rather, are based solely upon Louisiana state law.

Although some of the allegations in Wells's petition for damages could be construed as stating a claim under the ADA, Wells's rejection of the notion that he is bringing an ADA claim provides a sufficient basis for granting the defendants' motions for summary judgment on this particular issue. To the extent that Wells's complaint states a cause of action under the ADA, the defendants' motions are granted. All claims that are or could be brought by Wells pursuant to the ADA are dismissed with prejudice.

Wells's state law complaint could be construed as bringing a claim under Louisiana disability discrimination laws. LSA-R.S. § 23:321 et seq. The defendants have not moved for summary judgment on a state disability discrimination claim. Nevertheless, dismissal of these claims, if Wells does in fact assert them, seems appropriate. In his memorandum opposing summary judgment, Wells does not address state disability discrimination statutes. Rather, Wells states that "the individual defendants' motive was to punish plaintiff for reporting to the Louisiana State Police their taking roofing material . . . . " Plaintiff's Memorandum Opposing Summary Judgment, 25. Wells's focus is upon state whistle blower and retaliation claims, not disability discrimination. All claims that are or could be brought by Wells pursuant to state disability discrimination law, therefore, are dismissed with prejudice.

RetaKation claim under LSA-R.S. § 23:967

Louisana's whistle blower statute provides protection from reprisal by an employer when "an employee . . . in good faith, and after advising the employer of the violation of law, [d1iscloses or threatens to disclose a workplace act or practice that is in violation of state law." LSA-R.S. § 23:967(A)(1). Wells states that he reported to a Louisiana law enforcement agency that Alwell removed roofing material from a re-roofing job at the City's power plant. The Louisiana state police investigated Alwell and Hamernick but found they had not violated a state law. Wells believes that Alwell and Hamernick gave him physically demanding tasks and refused to allow him to attend physical therapy in retaliation for Wells's reporting of Alwell. In his complaint, Wells cites a statement by Hamernick that the employee responsible for the investigation was "going to catch it."

In their motions for summary judgment, the defendants point out that neither Alwell nor Hamernick was found to have violated a Louisiana state law. For an employee to be protected under Louisiana's whistle blower statute, the employer "must have committed a'violation of state law."' Puig v. Greater New Orleans Exspressway Comm'n, 772 So. 2d 842, 845 (La. Ct. App. 2000). Absent a finding of a violation of state law, Wells cannot invoke the protections of the whistle blower statute. Even if there had been a violation of state law, it is not clear that Wells could take advantage of the whistle blower protections because he did not report Alwell's actions to the City prior to contacting the state law enforcement agency as the statute requires. See LSA- R.S. § 23:967(A).

Wells counters in his memorandum opposing summary judgment that even
though Alwell and Hamernick committed no crime by removing the roofing material, they did violate a state law by accepting a gift of roofing material from the roofing contractor pursuant to LSA-R.S. § 42:1115(B). Section 42:1115(B) states in part, "No public employee shall solicit or accept ... anything of economic value as a gift or gratuity from any person ... if such public employee knows or reasonably should know that such person conducts operations or activities which are regulated by the public employee's agency." Louisiana protects public employees who report a violation of Section 42:1115(B) to the appropriate authority under LSA-R. S. § 42:1169(B) (stating "Any public employee who reports to a person or entity of competent authority or jurisdiction information which he reasonably believes is a violation of any law . . . shall be free from discipline or reprisal for reporting said acts of alleged impropriety.").

It is not clear that Wells may rely upon Section 42:1169(B) for protection from Alwell's and Hamernick's alleged retaliation Section 42:1169(B) is part of the Code of Governmental Ethics ("Code"). LSA-R.S. § 42:1101 et se . Under the Code's procedures, a Board of Ethics has jurisdiction to administer and enforce the provisions of the Code. LSA-R.S. § 42:1132(0). Defendants argue wells did not comply with the Code's procedures for making a complaint. In addition, Wells does not state in his complaint that Alwell and Hamernick accepted anything of economic value as a gift from the roofing contractor. Wells's reporting of Alwell's and Hamernick's activities to a state law enforcement

agency suggests that Wells was concerned with a possible criminal violation rather than an ethical one.

There is very little case law interpreting the scope of the language of Section 42:1169(B). See Nolan v. Jefferson Parish Hospital Service Dist. No. 2, 790 So. 2d 725, 731-32 (La. Ct. App. 2001) (discussing Section 42:1169). The language of Section 42:1169(B) may be broad enough to allow Wells to bring a claim if there was actual retaliation. Section 42:1169 (B) prohibits retaliation against " [a]ny public employee who reports to a person or entity of competent authority or jurisdiction information which he reasonably believes is a violation of any law or of any order, rule, or regulation issued in accordance with law or any other alleged acts of impropriety related to the scope or duties of public employment .... " An "entity of competent authority or jurisdiction" is not defined in the statute, but such an entity could include a state law enforcement agency, such as the Louisiana state police. Furthermore, Section 42:1169(B) applies to the reporting of "a violation of any law," not only to a violation of a Code provision. If Wells reasonably believed Alwell and Hamernick removed the roofing material in violation of law, then he could invoke the protections of Section 42:1169(B).

As explained below, the court finds that Hamernick and Alwell did not engage in tortious or retaliatory acts when they assigned Wells maintenance duties. Having failed to show that Hamernick and Alwell engaged in tortious or retaliatory conduct, Wells cannot show that the defendants' actions were in reprisal for reporting allegedly improper conduct. Absent a finding of retaliation, Wells cannot invoke the protections of Section 42:1169(B).

The defendants' motions for summary judgment on Wells's claim for retaliation under LSA-R.S. § 23:967 and LSA-R.S. § 42:1169 are granted. Wells's retaliation claims are dismissed with prejudice.

Intentional tort claim

Wells alleges in his complaint that defendants Alwell and Hamernick intentionally assigned him job duties that were proscribed by his treating physician. As a result of these assigned job duties, Wells reinjured his knee and sustained additional pain and suffering. Wells contends these assignments were intentional and discriminatory and made in reprisal for Wells's reporting of Alwell to the Louisiana state police. Both parties agree that an employee's ordinary remedy for injuries sustained during employment is workers compensation. See LSA-R.S. § 23:1032; Adams v. Time Saver Stores, Inc., 615 So. 2d 460, 461 (La. Ct. App. 1993). An employee may seek damages outside of the workers' compensation scheme only if the employee is injured by an intentional act of the employer. Adams, 615 So. 2d at 461.

Both parties also agree on the definition of "intent" under Louisiana law. A person acts with intent when he "1) consciously desires the physical result of his act, whatever the likelihood of that result happening from his conduct; or 2) knows that the result is substantially certain to follow from his conduct, whatever his desire may be as to that result." Reeves v. Structural Preservation Systems, 731 So. 2d 208, 211(La.1999) (citing Bazle v. Tortorich, 397 So. 2d 475, 481 (La. 1981)

The parties disagree, however, on whether plaintiff can show that Alwell and Harnernick either consciously desired or were substantially certain to injure Wells by assigning him physically demanding duties. Plaintiff asserts that there is sufficient evidence to show that Alwell and Hamernick consciously desired to injure Wells and that defendants mistakenly rely upon the "substantially certain" prong of the definition in their summary judgment motions.

Plaintiff also argues that determinations involving a party's state of mind are often inappropriate on summary judgment because these determinations require credibility assessments. See International Shortstop, Inc. v. Rally's, Inc., 939 F.2d 1257,1265-66 (5th Mr. 1991). Wells does concede in his memorandum that summary judgment is appropriate if a party rests upon conclusory allegations, probable inferences, and unsupported speculation to show the defendant's state of mind. See id. at 1266.
The plaintiff cites four separate occasions upon which Hamernick assigned Wells to jobs that caused injury to his knee: 1) on 11 August 2000, Wells was told to strip and wax the turbine floor; 27 on 3 February 2401, Wells was told to clean a hot well; 3) on 12 February 2001, Wells was told to work in and clean a condenser; and 4) on 21 February 2001, Wells was told to strip and wax the turbine floor. In addition, Wells claims Hamernick prevented him from attending physical therapy sessions on multiple occasions.

Wells contends that he was ordered to strip and wax the turbine floor on
11 August 2000 under threat of termination. Hamernick counters that he told Wells to accept the assignment or

to go home because Wells was working overtime. Deposition testimony of A. E. Craig ("Craig") corroborates that wells was told he would be sent home, not terminated, if he could not perform the assignment, After this incident, wells approached the City Personnel Director, Pamela Saurage ("Saurage"), and told her he was being asked to perform jobs that were not in his job description, such as mopping, stripping, and waxing floors. Saurage explained that Wells's job description included maintenance, which could include jobs like mopping and waxing floors. On 16 August 2000, Wells's physician issued new restrictions prohibiting maintenance duties for Wells; wells claimed that performing maintenance duties aggravated his knee. Wells was not given any more maintenance assignments until February 2001. Saurage testified in her deposition that Wells did not complain about the maintenance duties he was assigned in February 2001.

The approximate six-month gap between the first maintenance assignment in August and the three maintenance assignments in February is problematic for Wells's claim. Had Hamernick assigned Wells to clean hot wells or to strip and wax turbine floors in the fall of 2000, after Wells's physician issued the additional restrictions, then Hamernick's intent to cause Wells harm would be more certain. As the undisputed time frame of the maintenance assignments reveals, however, it was not until February of 2001 that Wells was told to perform these tasks. After these assignments, Wells did not protest to Saurage or consult his physician about renewing the maintenance restriction. It seems unlikely that Hamernick, having the conscious desire to cause injury to Wells, would

abide by the physician's restrictions until February 2001, and then give Wells a series of maintenance assignments. The maintenance assignments in February 2001 seem to be consistent with the needs of the business as well as Hamernick's belief that Wells was capable of performing the work.

Wells also asserts that Hamernick assigned him these four jobs and prevented him from attending physical therapy sessions with Alwell's knowledge and approval. Other than Wells's own assertion, there is no testimony or evidence that Alwell participated in making the assignments or that Alwell knew and approved of these assignments. The arguments that Wells makes regarding Alwell are the sort of unsupported allegations that are insufficient to show a party's state of mind. Wells has not shown that there is any genuine issue of material fact regarding Alwell's conscious desire to injure Wells.

Regarding the physical therapy sessions, the defendants all concede there was one time when Wells was not permitted to leave work to attend a physical therapy session. On that occasion, Wells was required to remain at work because the plant was understaffed, his help was needed to complete a project, and Wells had not given his supervisors sufficient notice of his physical therapy session. Personnel Director Saurage stated in her deposition that Wells told her once that he had a conflict between his work and physical therapy schedules, but to her knowledge, that conflict was resolved. She testified that the City allows employees to take time off to attend physical therapy sessions as long as an employee's absence does not create undue hardship for the department. She testified that employees could be asked to reschedule physical

therapy sessions and other medical appointments if necessary. Saurage also stated that time off for physical therapy sessions had to be cleared with an employee's department head.

Although Wells asserts that he was denied permission to attend multiple physical therapy sessions, he has not provided dates, or even general times, when these denials occurred. The defendants, in contrast, have explained one time when Wells was not permitted to attend a physical therapy session. Defendants also have explained why permission was denied and that the denial was in keeping with the City's policy regarding medical absences. There is insufficient evidence to show that Hamernick or Alwell prevented Wells from attending physical therapy sessions with the conscious desire to injure him.

The defendants' motions for summary judgment on Wells's intentional tort claims are granted. Wells's intentional tort claims are dismissed with prejudice.

Constructive discharge

Wells states in his complaint that he resigned his employment with the City in April 2001 as a result of "the continued hostile work environment and the continued harassment by" Alwell and Hamernick. Wells asserts he began looking for another job in August 2000 and that in February 2001, he realized he needed to leave his job with the City or remain and "put up with the continued intolerable retaliation of defendants."

Under the standard articulated by the Fifth Circuit, a constructive discharge occurs when an employer has made employment conditions "so intolerable that the

employee reasonably felt compelled to resign." Shawgo v. Spradlin, 701 F.2d 470,481 (5th Cir.1983); see also Young Southeastern Savings and Loan Association, 509 F.2d 140, 144 (5th Cir. 1975); Bourque v. Powell Electrical Manufacturing Co., 617 F.2d 61, 65 (5th Cir.1980).

Wells relies exclusively upon Fifth Circuit case law to show he has a claim for constructive discharge. This reliance upon federal law is inconsistent with Wells's previous assertion that he is bringing only state law claims against defendants. Wells cannot rely upon federal law for his constructive discharge claim and, in the same pleading, disavow that his claims arise under federal law. The majority of the cases cited by Wells deal with federal employment discrimination law. Because Wells brings only state law claims, these cases are irrelevant and do not support his allegation that he was constructively discharged.

Even if these cases were relevant to Wells's suit, the alleged harassment does not arise to a level that is so intolerable a reasonable employee would feel compelled to resign The four contested maintenance assignments occurred over a period of six months; they do not show a pattern of harassment or hostility. In addition, the single denial of Wells's request to attend a physical therapy session could not contribute to a hostile work environment in which Wells felt compelled to resign from his position.

The defendants' motions for summary judgment on Wells's claims for constructive discharge are granted. Wells's claims for constructive discharge are dismissed with prejudice.

Course and scope of employment

The plaintiff's complaint also alleges that at all pertinent times, the defendants Alwell and Hamernick were acting within the course and scope of their employment with the City. Because the two defendants were acting in furtherance of the City's objectives, wells asserts the City is vicariously liable for Alwell's and Hamernick's actions.

The City denies that it is vicariously liable for any injury to Wells, asserting that it did not condone any of Alwell's and Hamernick's alleged actions. The City also asserts that any intentional or discriminatory acts by Alwell and Hamernick were beyond the course and scope of their employment.

Under Louisiana law, "an employer (master) is liable for a tort committed by his employee (servant) if, at the time, the servant is acting within the scope of his employment." LeBrane v. Lewis, 292 So. 2d 216, 217 (La. 1974) (citing LA. CIV. CODE art. 2320.); see also Baumeisterv. Plunkett, 673 So-2d 994, 996 (La. 1996) (stating, "According to Louisiana Civil Code article 2320, [m]asters and employers are answerable for the damage occasioned by their servants and overseers, in the exercise of the functions in which they are employed."') .

It has already been determined that Hamernick and Alwell did not engage in tortious conduct while working as City employees. The City, therefore, cannot be held

vicariously liable for the alleged tortious conduct of Hamernick and Alwell.

The defendant City's motion for summary judgment on Wells's vicarious liability claim is granted. Wells's claim seeking to hold the City vicariously liable is dismissed with prejudice.

CONCLUSION

The motions for summary judgment filed by the City, Hamernick, and Alwell are granted. Wells's claims against the defendants are dismissed with prejudice

F. A. LITTLE, JR.

UNITED STATES DISTRICT JUDGE

No. 03-30750

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

CHADWICK E WELLS,

Plaintiff - Appellant

v.

CITY OF ALEXANDRIA; JOHN HAMERNICK; WILLIAM GERARD ALWELL,

Defendants - Appellees

May 24, 2004, Filed

JUDGES: Before King, Chief Judge, Reavley and Emilio M. Garza, Circuit Judges.

OPINIONBY: Thomas M. Reavley

OPINION: ON PETITION FOR REHEARING

PER CURIAM:

IT IS ORDERED that the petition for rehearing is denied.

ENTERED FOR THE COURT:

Thomas M. Reavley

United States Circuit Judge.

DOCKET NO. 03-30750
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CHADWICK F. WELLS

VERSUS

CITY OF ALEXANDRIA, ET AL

MOTION TO SUPPLEMENT THE RECORD ON APPEAL

NOW INTO COURT, through undersigned counsel, comes CHADWICK F. WELLS. Appellant herein, who desires to supplement the record on appeal in the above captioned matter with a certified copy of the medical records of Dr. David Pope. Appellant's treating orthopaedist for the period from February 14, 2000 to May 1, 2002 for the following reasons:

1.

During oral argument on April 6, 2004 before this Court at Baylor University in Waco, Texas, a question arose for the first time as to whether or not Appellant's physical restriction of ninety (90%) percent of his job duties imposed on him by Dr. Pope was in effect when Appellant was ordered on August 11, 2002 by Defendant Hamernick to strip and wax the floor of Turbine #4 at the City of Alexandria Power Plant.

2.

Counsel for Appellees made a representation to this Court during oral argument that Appellant's work restriction by Dr. Pope had expired by its very terms on March 15, 2000 (See Treatment and Restriction Report dated February 28, 2000) of Dr. David Pope.)

3.

Appellant shows that the certified medical records of Dr. Pope, a copy of which is attached hereto, made a part hereof and marked as Exhibit "A," show that March 15,2000 was Appellant's next scheduled appointment with Dr. Pope and that Dr. Pope's office notes of subsequent visits show the work restriction imposed on Appellant continued and was still in effect on Appellant's doctor's visit of July 26, 2000 immediately prior to August 11 , 2000 when Dr. Pope stated "Continue present work activities with restrictions." (See attached Exhibit "A," pg. 5: Dr. Pope's office notes of 7/26/00 visit.)

4.

Appellant shows that all of the exhibits submitted in the record by all parties in connection with the Motions for Summary Judgment and in Opposition thereto, did not include all the pertinent medical records and in order to clear up any mistaken inferences and to complete the record for this Court to perform an complete de novo review of the decision granting the Motions for Surnmary Judgment, the attached aforesaid medical records are pertinent and should be made a part of the record herein.

WHEREFORE, Appellant, CHADWICK E. WELLS, prays that the record of the above captioned matter, be supplemented with a certified copy of the medical records of Dr. David Pope, Appellant's treating orthopaedist for the period from February 14, 2000 to May 1, 2002 (Exhibit "A") and that said records be considered by this Court in arriving at its decision.

Respectfully submitted:
BROUSSARD, BOLTON, HALCOMB & VIZZIER
DANIEL E. BROUSSARD, JR., #3510

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ATTORNEYS FOR APPELLANT

DOCKET NO. 03-30750
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CHADWICK F. WELLS

VERSUS

CITY OF ALEXANDRIA, ET AL

ORDER

Considering the foregoing, it is
ORDERED that the appeals record of the above captioned matter be supplemented with a certified copy of the medical records of Dr. David Pope, Appellant's treating orthopaedist, for the period from February 14, 2000 to May 1, 2002,
SIGNED at on this the day of April I. 2004.
JUDGE - UNITED STATES COURT OF APPEALS

INFOSTAT,L.L.C.
A RELEASE OF INFORMATION SERVICE

CERTIFICATION
Date: 4/7/04

I hereby certify that the enclosed 10 pages are true, and correct copies of medical records in our possession concerning Chadwick Wells for his/her care and treatment by The Orthopaedic & Sports Medicine Specialists.

ORTHOPAEDIC & SPORTS MEDICINE SPECIALISTS
#0700 WELLS, Chadwick 02-14-00 DOS: 02-01-99

PROGRESS NOTE: Follow-up, ACL reconstruction. Doing well. A little stiff still.

PHYSICAL EXAM: On exam. minimal effusion. He has good patella mobility, both medial lateral and superior interior. He has range of motion measuring from 0° to approximately 80° to 85°.

PLAN: Continue protocol. Hold off on work activities. Follow-up in two weeks. DP MD/bc

#0700 WELLS, Chadwick 02-28-00 DOS: 02-01-00

PROGRESS NOTE: Follow-up, ACL reconstruction. Doing great Much improved Progressing along nicely.

PHYSICAL EXAM: Incision looks good. Good patella mobility. Scant effusion present. Range of motion now about 115°. He has about 5° hyperextension today. Very stable to gentle Lachman testing.

RECOMMENDATIONS: Continue protocol and recheck in two weeks. We will start some work activities on the 8th, sedentary type activities. DP, M.D./bc

#0700 WELLS, Chadwick 03-15-00 DOS: 02-01-00
PROGRESS NOTE: Follow-up, ACL reconstruction.
PHYSICAL EXAM: Approaching 120° of flexion. Good patellar mobility. No effusion. Stable on exam.

RECOMMENDATIONS: Protocol Recheck in one month. Light duty work until follow-up.
dp, m.d./BC

CC: Worker's Compensation

CITY OF ALEXANDRIA
PERSONNEL DEPARTMENT
PAMELA SAURAGE DIRECTOR

February 28, 2000

Re: Chad Wells
Social Security No. 433-61-0832

Dear Dr. Pope:

We are in receipt of your Treatment / Restriction Report dated February 28. 2000 regarding the above-referenced employee. Your report states Mr. Wells is restricted to light duly. In order for the City to allow Mr. Wells to return to work, he must be able to perform ninety percent (90%) of the responsibilities outlined in his job description.

Please find attached Mr. Wells' job description for your review. After analyzing this information, please provide a written prognosis regarding Mr. Wells' ability to perform his job duties.

Your prompt attention to this matter will be greatly appreciated. Should you have any questions, please do not hesitate to call.

Sincerely,
Pamela L. Saurage, Director of Personnel

Patient, Chad Wells is able to return to work @ City of Alex as an Operator II @ 90% of Pt's job duties

ORTHOPAEDIC & SPORTS MEDICINE
SPECIALISTS
TREATMENT / RESTRICTION REPORT
Employee Name: Chad Wells

Social Security: 433-61-0832
Date of Injury:4-10-97 Work Related: Yes

Company Name: City of Alexandria
Supervisor: Job Title:
Date of Visit2-28-00
Job Title:
Nature of Injury and Diagnosis:
Treatment: PT:
Was prescription medication ordered? Yes
Will follow-up care he required? Yes

It yes, list next appointment date and limc: 3-15-00

Work Status
It is my opinion that this employee (Please check one)
1. Can return to his/her light duty at 90% on 3-8-00.

3.Can return to work with the following restrictions:
Light/Sedation
Restrictions in Effect until (date) 3-18-00

Physician's Signature
Date2-28-00

#0700 WELLS, Chadwick 04-26-00
DOS: 02-01-00

PROGRESS NOTE: The patient is in for follow-up of ACL reconstruction. The knee gets a little sore at times.

PHYSICAL EXAM: On his exam, he has an excellent range of motion with near full flexion, near symmetric extension. No effusion. Very stable to Lachman testing. Quad girth- is improving.

PLAN: At this point, we are going to continue protocol He is going to need some dedicated strengthening on his quads. I will have the therapist check an isokinetic test prior to his follow-up visit. He will continue his present activities at work. Possibly start a running program in one month.

#0700 WELLS, Chadwick 05-29-00
DOS: 02-01-00

PROGRESS NOTE: Follow-up for ACL reconstruction. Occasional pain in full extension; otherwise, he is doing well. No instability.

PHYSICAL EXAM: His motion looks very good with full range of motion. Graft is very stable. No effusion today. His quad strength is only up around 50% or just slightly over compared to the uninvolved side.

PLAN: At this point, we just need to continue strengthening. He is doing very nicely. He still cannot get more aggressive with running, etc. until he's up to about 70%. Recheck in about six weeks.

#0700 WELLS, Chadwick 07-10-00
DOS: 02-01-00

PROGRESS NOTE: The patient is in for follow-up of his knee. He has had some aggravation in the knee. This has been going on for a few weeks. I have a note from the therapist that he had to back off on all his activities. He had intermittent swelling and mostly anterior.

PHYSICAL EXAM: On his exam today, he has full range of motion. No effusion Full extension. The graft is very stable. The most notable finding today is just fairly significant tenderness over the patellar tendon.

X-RAYS: X-rays today look good. The graft is in good position. Tunnel position looks okay I don't see any evidence of acute fracture of the patella.

IMPRESSION: Status post ACL patellar tendinitis.

RECOMMENDATIONS: We are going to place him on some modalities to see if we can get things settled down. Relafen. We will see him back in about 2 to 3 weeks. We are going to have to back off on his PRE's at this time.

#0700 WELLS, Chadwick 07-26-00

PROGRESS NOTE: Follow-up, knee. Doing much better. Much less tenderness over the patella He has responded well to the therapy modalities. We are going to get him back into a little more aggressive

strengthening, etc. Follow-up in about 6 weeks. Continue present work activities with restrictions.

TREATMENT / RESTRICTION REPORT
#700 WELLS, Chadwick 08-13-01
PROGRESS NOTE: Mr. Wells in for follow-up of his knee. He has been working for the city water department. He is tolerating this well. He has occasional discomfort but no instability. States he is able to tolerate this activity without recurrent exacerbation of knee pain and irritation which he was experiencing prior.

RECOMMENDATION/PLAN: Apparently he is planning to move to Alabama. We are going to go ahead and release him at this time. He has had a reasonable result with his knee stabilization surgery. I do not feel that he will be capable of millwriting activity which he was doing pre-operatively, but I think he is capable of performing the job with the city in his current capacity which he seems to be tolerating well. We will follow him up on a prn basis as needed.

#0700 WELLS, Chadwick 08-16-00 DOS: 02-01-00
PROGRESS NOTE: Mr. Wells is in for follow-up of his knee. The last time I saw him in clinic, he was doing well. He was progressing nicely with his rehab. He had had a flare up and some patellar tendinitis which have settled down. Apparently, at his work place, he is involved in some maintenance, stripping and waxing the floors, for a number of hours straight. The twisting motion involving the knee aggravated it, and he had significant swelling. This is documented by the therapist. Quite a bit of pain. Things have actually settled down somewhat since then, but he is still having

discomfort above and beyond what he had been experiencing.

PHYSICAL EXAM: On his exam today, he has mild effusion present. He does have a lot of irritability about the patellofemoral joint. Tender on the medial lateral facet. No joint line tenderness The knee is, otherwise, stable to Lachman testing.

RECOMMENDATIONS: At this time, he seems to have aggravated the knee with a twisting motion involving in mopping. I don't think he has any problems performing his operator 11 position, but I would suggest restricting the assistant maintenance activities, especially with the involved prolonged standing at this time. Recheck in a couple of weeks Continue with therapy to see if we can get things settled down. Refill Relafen.

#700 WELLS, Chadwick 09-06-00 DOS: 02-01-00

PROGRESS NOTE: Here for follow-up of knee. I backed off of some of the twisting activities at work which seemed to settle things down considerably.

PHYSICAL EXAM: On exam he has maintained his motion. There is no effusion He is still a little tender over the incision, distally over the graft site. No other significant tenderness noted. He is stable.

RECOMMENDATIONS: Continue present restrictions. I will let him continue therapy and recheck him in about four to six weeks I think things have hopefully settled down at this point.

#700 WELLS, Chad 02-23-01

PROGRESS NOTE: Mr. Wells is in for follow-up of his knee. He has had two accidents at work. One where he apparently stepped out of a hole and sustained a twisting injury to right knee with some associated swelling. Following that, more recently he was waxing some floors. He stated that it was very slick, and he lost his footing on the right side. He fell backwards, caught all of his weight on his left leg, and grabbed himself between a desk and the wall preventing the fall. He did not actually hit the ground. He had an onset of some pain in that knee as a result of that, predominantly on that right side. He denied any initial back pain but later that afternoon started feeling some discomfort in the right paraspinal region of the lumbosacral spine. He had not had any previous back complaints. At this time, both his knee and his back are settling down. He is still having some lateral sided knee pain, no gross instability. The back likewise is settling down significantly just with rest.

PHYSICAL EXAM: On his physical exam, he has a slightly antalgic gait. He has maintained full motion of his knee. He still has a fair amount of quadriceps atrophy in the thigh itself on the right. I couldn't see any effusion to speak of today. The knee was stable to Lachman testing, and he had a negative Pivot shift. He had full extension.

RECOMMENDATIONS: At this point, I am going to hold him off some work activities. I am going to start him on some Vioxx. I will see him in 10 to 14 days for a recheck. I would hold on therapy. If things aren't significantly improving both with the knee and the back

with rest and light activities, then he will give me a call towards the middle or end of next week, and he can start some therapy but I will hold on that at this time. I think his prognosis is good. We should be able to get him back within that time frame.

#700 WELLS. Chadwick 05-01-02

PROGRESS NOTE: Mr. Wells is in for follow-up of his knee. He is currently residing in Alabama and is working there reading meters. This involves some standing and walking activities which he is tolerating fine. He states he gets some intermittent pain in the knee which is infrequent, mostly located anterolaterolly. He denies any significant swelling or instability of the knee He has some sensitivity over the anterior/medial aspect of the knee in the area of the tunnel which prevents him from kneeling on that side. Also, squatting is somewhat difficult for him at this time.

PHYSICAL EXAM: On his exam, he has a smooth, reciprocal gait. He has just a little mild residual quad atrophy on that right side, but his muscle tone looks good. He has full hyperextension and flexion of the knee. He is stable to varus and valgus stress. He is tender over that anterior/medial aspect of the knee in the area of the tibial tunnel. There is no palpable prominence present there. He has a negative Lachman and negative pivot shift on his exam today.

X-RAYS: AP and lateral views of the knee reveal well preserved joint spaces. No evidence of any arthrosis or joint line narrowing, and the hardware all appears to be in good position.

RECOMMENDATION/PLAN: At this time, the patient is at MMI following his ACL reconstruction, meniscus repair, on 02-01-00. He will have some long-term restrictions regarding his activities which would include no kneeling and squatting only on an occasional basis. Also, he would be unable to crawl on that knee. For this reason, I do not believe he will be able to return to his millwright activity. In addition, this would include avoiding roofing activity which I think he was involved with at some point. I would limit his lifting to 50 lbs on an occasional basis and carrying 50 lbs on an occasional basis.

According to the Fifth Edition of the AMA Guides, he would have an impairment of 7% lower extremity and 3% whole body based on mild cruciate laxity.

He will be discharged at this time and will follow-up on a prn basis should he have any further problems.

CERTIFICATE

I hereby certify that I have this day forwarded a copy of the above and foregoing motion and Order to Supplement the Record on Appeal to Mr. Stacy C. Auzene, Keiser, Auzenne & Boudreaux, P.O. Box 12394, Alexandria, Louisiana, 71315-2394, Mr. H. Bradford Calvit, Provosty, Sadler, deLaunay, Fiorenza & Sobel, P.O. Box 1791, Alexandria, Louisiana, 71309-1791 and Mr. Richard A. Rozanski, Wheelis & Rozanski, P.O. Box 13199, Alexandria, Louisiana, 71315-3199, on this 8'h day of April, 2004 at Alexandria, Rapides Parish, Louisiana.

DANIEL F. BROUSSARD, JR.

No. 03-30750

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
CHADWICK E. WELLS,
Plaintiff-Appellant,

versus

CITY OF ALEXANDRIA; JOHN HAMERNICK;
WILLIAM GERARD ALWELL,
Defendants-Appellees.

Appeal from the United States District Court for the Western District of Louisiana, Alexandria

O R D E R

IT IS ORDERED that appellant's motion to supplement the record with a certified copy of the medical records of Dr. David pope, is denied.

THOMAS M. REAVLEY
UNITED STATES CIRCUIT JUDGE

CIVIL DOCKET NUMBER 205,419
DIVISION F
9th JUDICIAL DISTRICT COURT PARISH OF RAPIDES
STATE OF LOUISIANA

CHADWICK E. WELLS,
Plaintiff,

versus

CITY OF ALEXANDRIA ET AL,
Defendants.

PETITION FOR DAMAGES

The petiton of CHADWICK E. WELLS, a resident and domiciliary of the County of Tuscaloosa, Slate of Alabama, respectfully represents that

1.

Made defendants herein are:

(A) CITY OF ALEXANDRIA, a municipal corporation existing under and by virtue of the constitution laws of the State of Louisiana (hereinafter referred to as "CITY");

(B) GERARD W. ALWELL, a resident of the full age of majority of the Parish of Ripides; and,

(C) JOHN HAMERNICK, a resident of the full age of majority of the Parish of Rapides.

2.

Defendants are justly, truly and legally indebted unto petitioner jointly, severally and in solido, for all such sums as will fully compensate petitioner for all damages he sustained arising out of the occurrences described

hereinafter, together with legal interest on all sums from date of judicial demand until paid, and for all costs of these proceedings for the reasons stated hereinafter.
At all times pertinent herein petitioner and defendants, ALWELL and HAMERNICK, were employees of defendant, CITY; in the Electric Production Department; petitioner being an Operator II, defendant ALWELL being Superintendent of Electric Production; and defendant HAMERNICK being Chief Plant Operator and Defendants being plaintiff's supervisors over the plant.

4.

Petitioner shows that on or about February 1, 2000 he had right knee surgery for an ACL repair and a menisectomy on his right knee which he had previously injured in 1997.

5.

On or about March 8, 2000, petitioner returned to his employment duties with the CITY, having been released by his treating physician as being capable of performing ninety (90%) percent of his job duties as outlined in his job description.

6.

Petitioner shows that after his return to work in March he continued to attend and receive physical therapy treatment for his knee.

7.

Petitioner shows that subsequent to his return to employment, he reported and furnished documentation to a Louisiana law enforcement agency of Certain activities of defendant ALWELL in removing new roofing material from the re-roofing job of the Cily's power plant in his private vehicle after hours while off-duty; an investigation ensued by that law enforcement agency.

8.

Shortly after the above investigation was conducted, defendant HAMERNICK advised plaintiff that any power plant personnel that was responsible for the investigation was "going to catch it."

9.

Petitioner further shows that while petitioner was receiving physical therapy treatment, defendant ALWELL resisted and at times refused to allow petitioner time off to attend his physical therapy sessions in accordance with his treating physician's orders.

10.

Petitioner shows that he complained to defendant ALWELL's superiors about the difficulty he was having in attending physical therapy treatments due to defendants ALWELL's s and HAMERNICK's conduct.

11.

As a result of petitioner's conduct Set forth in paragraph 10 above, defendant HAMERNICK threatened petitioner for contacting defendants' superiors concerning petitioner going to physical therapy.

12.

On or about August 11, 2000 defendant HAMERNICK ordered petitioner to strip and wax the floor of turbine #4 or to go home it he refused.

13.

Petitioner shows at the time he was ordered to strip and wax the floor of turbine #4 maintenance personnel were available at the plant to perform this job and they attempted to assist petitioner but were ordered to stop their efforts by defendant HAMERNICK.

14.

Petitioner also shows at the time he was ordered to strip and wax the floor of turbine #4 both defendants, ALWELL and HAMERNICK, were aware of petitioner's physical disability and the restrictions placed on him by his doctor as well as the fact that that job was beyond plaintiff's ability at that time

15.

Petitioner shows that as a result of performing the duties assigned him that day, petitioner's knee became swollen and painful causing him difficulty to walk on it

16.

As a result of the above-described incident, petitioner returned to physical therapy on August 14, 2000 having increased pain in his knee which had been aggravated and made worse by the activities assigned to him by defendant HAMERNICK.

17.

As a result of the aforesaid activity being assigned by defendant HAMERNICK, petitioner's treating physician increased his restrictions to avoid janitorial duties or assist in maintenance activities and prolonged standing.

18.

Petitioner further shows that in January 2001 defendant ALWELL advised petitioner that he would need a doctor's release to perform one hundred (100%) percent of his job duties to retain his job position.

19.

Petitioner further avers that on or about February 3, 2001, defendant HAMERNICK ordered petitioner to get into a hot well and clean it; the hot well being two and one-half (2) to three (3) feet high and requiring a person in it to squat and crawl for several hours; petitioner complied with this order under the threat of termination.

20.

On February 12, 2001 petitioner was ordered to work in and clean a condenser-, this job required climbing and working in a squatting position; petitioner complied with this order.

21.

On February 21, 2001 petitioner was ordered to strip and wax the turbine floor; and petitioner complied with that order.

22.

All of the above actions of defendant HAMERNICK caused petitioner to reinjure his knee necessitating his missing work and receiving workers compensation benefits.

23.

Petitioner alleges that at all times pertinent herein, defendant HAMERNICK was acting with the full authority and knowledge of defendant ALWELL, which defendant ALWELL admitted to petitioner

24.

As a result of the continued hostile work environment and the continued harassment by the individual defendants herein, petitioner WELLS resigned his employment in April 2001.

25.

Petitioner shows that the individual defendants herein intentionally assigned him job duties that were against his treating physician's recommendation which caused him to re-injure his knee and sustain additional pain and suffering; the individual defendants' actions were intentional and discriminatory towards him and were in reprisal to punish petilioner for his actions in reporting defendant ALWELL's activities to the State law enforcement agency.

26.

Petitioner further shows thaI at all times herein, he was able to perform the essential duties of an Operator II but was unable to perform without pain and difficulty, the janitorial maintenance duties assigned to him by the individual defendants, which duties were not essential to the duties of an Operator II.

27.

Defendants knew of petitioner's disability with his knee and deliberately did not accommodate petitioner on the job for this disability.

28.

At all times pertinent herein, defendants ALWELL and HAMERNICK were acting within the ambit of their employment duties and in furtherance of the CITY's objectives rendering their employer, the CITY, vicariously liable for the acts of the defendants complained of herein.

29.

As a result of the defendants' actions in this matter, petitioner sustained the following damages:

a) Mental anguish, anxiety, emotional distress, and embarrassment and humiliation past and future;

b) Pain and suffering, past and future;

c) Loss of enjoyment of life, past and future;

d) Increased physical disability, past and future;

e) Loss of past and future income and fringe benefits from the date of his resignation; and

f) Reasonable attorney fees and costs.

30.

Petitioner shows that he is entitled to an award of money damages that are reasonable in the premises for the damages and items set forthe above.

31.

Petitioner asks for a trial by jury.

WHEREFORE, PETITIONER PRAYS that the defendants each be served with a copy of this petition and be duly cited to appear and answer same within the delays allowed by law; that after all legal delays have elapsed and due proceedings had, there be judgment rendered herein in favor of petitioner, CHADWICK E. WELLS, and against defendants, CITY OF ALEXANDRIA, GERARD W. ALWELL , and JOHN HAMERNICK, jointly, severally and in solido, for such sums as will fully compensate petitioner for all damages set forth herein including reasonable attorney fees together with legal interest and all sums from date of judicial demand until paid and for all costs of these proceedings;

PETITIONER FURTHER PRAYS for a trial by jury.

PETITIONER FURTHER PRAYS for all necessary orders and decrees. and for full, general and equitable relief.

BROUSSARD, BOLTON, HALCOMB & VIZZIER

DANIEL E. BROUSSARD, JR., #3510
ATTORNEYS FOR PETITIONER, CHADWICK E. WELLS

CLERK, PLEASE CITE AND SERVF THE FOLLOWING DEFENDANTS:
CITY OF ALEXANDRIA, LOUISIANA
which may be served through its Mayor
Honorable Ned Randolph
915 Third Street
Alexandria, Louisiana 71301

JOHN HAMERNICK
175 Moss Ridge Drive Pineville, Louisiana 71360

GERARD W. ALWELL
107 Prairie View Road Deville
Louisiana 71348
9th JUDICIAL DISTRICT COURT
PARISH OF RAPIDES
STATE OF LOUISIANA

CIVIL DOCKET NUMBER 205,419
DIVISION F
9th JUDICIAL DISTRICT COURT PARISH OF RAPIDES
STATE OF LOUISIANA

CHADWICK E. WELLS,
Plaintiff,

versus

CITY OF ALEXANDRIA ET AL,
Defendants.

ORDER

The above and foregoing Pettion for Damages considered; It is hereby ORDERED that plaintiff is hereby granted a Trial by jury upon posting security as provided by law and the Rules of this Court.

THUS DONE AND SIGNED this 15th day of August, 2001, at Alexandria, Rapider Parish, Louisiana.

JUDGE
NINTH JUDICIAL DISTRICT COURT

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
ALEXANDRIA DIVISION

CIVIL ACTION NO. CV01-1686-A
JUDGE F. A. LITTLE, JR.
MAGISTRATE JUDGE KIRK
LIST OF EXHIBITS

A. Deposition of Chadwick E. Wells **
B. Deposition of W. Gerard Alwell **
C. Deposition of R. John Hamernick, Jr.**
D. Deposition of Darren Keith Sigur**
E. Deposition of Lannis William Day**
F. Deposition of Jerry Sampract **
G. Deposition of Keith Wendell White**
H. Deposition of David A. Reed**
I. Deposition of Larry McGuirt**
J. Deposition of Floyd McFarland**
K. Deposition of Sonny Craig**
L. Deposition of Pam Saurage**
M. Copy of subpoena and Louisiana Sate Police Investigation File
N. (1-2) Job Descriptions of Operator 1 and Operator 2 *
0. Memorandum from Pam Saurage dated November 25, 1997*
P. Photographs (1-5) and Affidavit of Cecil Bunn
1. Control Room
2. Hot Well (2 pages)
3. Turbine Floor (2 pages)
4. Condenser
5. Defendant Alwell and son loading roofing material
Q. Employer Report of Injury dated February 21, 2001 *

R. Correspondence from Pam Saurage to Dr. David Pope dated February 28, 2000*

S. (1-2) Certified office notes of Dr. David Pope

1. Certification and record of August 13, 2001

2. Certification and record of February 23, 2001

T. Questionnaire of Dr. Pope changing limitations dated August 16, 2000*

Source: Photographs taken by Cecil Bunn (Affidavit of Cecil Bunn attached)

Source: Photographs taken by Jerry Sampract

* Source: Deposition of Pam Saurage Exhibit - Personnel record of Plaintiff

** Filed with original Memorandum only

Respectfully submitted:
BROUSSARD, BOLTON, HALCOMB & VIZZIER
DANIEL E. BROUSSARD, JR., #3510
P.O. Box 1311
912 Fifth Street
Alexandria, Louisiana 71309
(318) 487-4589

ATTORNEYS FOR PLAINTIFF

Q WHERE ARE THEY BASED OUT OF?
A HOUSTON.
Q OKAY. AND AS I UNDERSTAND IT THIS IS WHILE YOU WERE WORKING FOR O.S.I. IS WHEN YOU INJURED YOUR RIGHT KNEE; IS THAT RIGHT?
A. THAT IS CORRECT.
Q OKAY. WHO WAS YOUR SUPERVISOR IN - FOR O.S.I. WHILE YOU WORKED FOR THEM?
A DOMINICK GIOMETTA.
Q YOU WILL HAVE TO HELP ME ON THAT ONE.
A I CAN'T HELP YOU ON THAT ONE.
Q OKAY. GIOMETTA?
A GIOMETTA IS HOW IT IS PRONOUNCED.
Q GIOMETTA, OKAY. ALL RIGHT, ANYBODY ELSE FOR O.S.I. THAT YOU CAN RECALL?
A HE WAS THE MAIN ONE I WORKED WITH.
Q HE WAS THE MAIN ONE. OKAY, DO YOU KNOW WHAT TIME FRAME THAT YOU WORKED FOR O.S.T.? WAS THAT JUST ONE OF THOSE MANY FOLKS OR MANY COMPANIES?
A JUST ONE OF THE MANY COMPANIES.
Q OKAY. THEY HAPPENED TO HAVE WORK, YOU WENT?
A THAT IS CORRECT.
Q OKAY. AND AS I UNDERSTAND IT YOU INJURED YOUR KNEE IN '97?
A THE BEST - YES.

* * *

Q A TORN, A.C.L.?
A YES, AND ANOTHER PROBLEM. YOU WOULD HAVE TO LOOK AT THE MEDICAL.

Q HOW ABOUT THE KNEECAP, THE MEDIAL MENISCUS, WAS THERE A PROBLEM WITH THAT?
A YEAR, I BELIEVE THAT IS CORRECT.
Q OKAY. AND DOCTOR POPE WANTED TO DO SURGERY TO FIX THOSE PROBLEMS AT THE FIRST TIME YOU SAW HIM OR SHORTLY THEREAFTER?
A THAT IS CORRECT.
Q OKAY. HOW LONG DID YOU WAIT TO HAVE THAT SURGERY OF DID YOU HAVE IT RIGHT AWAY?-
A NO, I WAITED.
Q OKAY. WHY DID YOU WAIT?
A BECAUSE I DIDN'T WANT MY LEG CUT ON.
Q SURE. HAD YOU EVER HAD A SURGERY BEFORE THE KNEE SURGERY, MR. WELLS?
A YES.
Q WHAT SURGERY WAS THAT?
A APPENDIX.
Q OKAY. WAS THAT WHEN YOU WERE A CHILD?
A YES.
Q DID THEY RUPTURE OR DID THEY CATCH THEM BEFORE THEY RUPTURED?
A (NO VERBAL RESPONSE)

* * *

Q AND THEN YOU WOULD RETURN HOME UNTIL THE NEXT JOB CAME ALONG?
A THAT IS CORRECT.
Q OKAY. COULD YOU TELL ME, IF YOU RECALL, HOW MANY HITCHES YOU WENT ON AFTER YOUR KNEE INJURY UNTIL YOU STOPPED WORKING AS A MILLWRIGHT?

A NO, I DON'T RECALL EXACTLY WHEN.
Q OKAY. MORE THAN FIVE?
A I DON'T--
Q NO TELLING. OKAY, WELL, AS I UNDERSTAND IT YOU STARTED WORKING FOR THE CITY OF ALEXANDRIA AS AN OPERATOR SOMETIME IN '99; IS THAT RIGHT?
A I BELIEVE IT WAS '98.
Q '98. OKAY, AND WHY DID YOU START TO WORK WITH THE CITY? WAS IT A JOB THAT DIDN'T REQUIRE YOU AS MUCH PHYSICAL STRAIN ON YOUR KNEE OR WHAT? WHAT WAS THE REASON?
A NO TRAVELING.
Q NO TRAVELING. OKAY, WAS TRAVELING HARD ON YOU?
A YES.
Q WHAT POSITION DID YOU START WORKING FOR THE CITY AS?
A OPERATOR ONE.
Q OKAY. AND WHO WAS YOUR IMMEDIATE SUPERVISOR?
A I BELIEVE IT WAS KEITH.
Q KEITH WHITE?
A YES.

***

Q OKAY. AND YOU DON'T REMEMBER IF YOU MISSED ANY WORK?
A YOU WOULD HAVE TO CHECK THE RECORDS.
Q THE RECORDS WOULD SHOW IT, OKAY. ALL RIGHT, IT SAYS IN YOUR PETITION, AND I WILL READ IT, IN PARAGRAPH TWENTY-TWO ALL OF THE ABOVE ACTIONS, AND I'M TAKING THAT TO REFER TO THE INCIDENTS WE JUST

TALKED ABOUT, OF DEFENDANT HAMERNICK CAUSED PETITIONER TO REINJURY HIS KNEE NECESSITATING HIS MISSING WORK AND RECEIVING HIS WORK - RECEIVING WORKERS' COMPENSATION BENEFITS. IT IS MY UNDERSTANDING FROM THAT THAT MR. HAMERNICK WAS THE ONE DIRECTING YOU TO DO THESE THINGS WHICH EXACERBATED YOUR KNEE PROBLEM; IS THAT RIGHT?

A NOT - NO. HE WAS NOT THE SOLE - HE WAS NOT THE ONLY ONE.

Q OKAY. WHO WOULD HAVE BEEN ANOTHER ONE?

A GERARD TOLD ME THAT HE WOULD GIVE THE ORDERS TO JOHN ON SOME THINGS.

Q OKAY. AND MR. ALWELL TOLD YOU THAT DIRECTLY?

A THAT IS CORRECT.

Q AND THEN YOU TOLD ME ABOUT THE INCIDENTS WHERE YOU TALKED TO SONNY CRAIG AND PAM SAURAGE. WAS THERE ANOTHER - OR ANY OTHER INCIDENTS WHERE YOU SPOKE TO EITHER SONNY OR PAM?

A I DON'T RECALL EXACTLY WHEN ALL THAT - I TALKED TO THEM A COUPLE OF TIMES.

***

Q OKAY. WAS THERE EVER A TIME THAT EITHER TALKING TO PAM OR TO SONNY THEY TOLD YOU THAT THEY COULDN'T DO ANYTHING?

A I DON'T RECALL.

Q OKAY. BECAUSE EARLIER YOU TOLD ME THAT WHEN YOU SPOKE TO PAM AND/OR

SONNY, PAM TOLD YOU TO GO TO YOUR THERAPY, THAT SHE WOULD TAKE CARE OF IT?

A YES, THAT IS WHAT SHE GOT BACK TO ME WITH.

Q OKAY. AND AS A RESULT OF THAT MEETING YOU WERE ABLE TO GO TO YOUR THERAPY AND YOU WERE NEVER DENIED THE ABILITY TO GO BACK TO THERAPY AFTER THAT DISCUSSION YOU HAD WITH PAM AND SONNY; IS THAT RIGHT:

A THAT IS CORRECT.

Q OKAY. NOW, DO YOU REMEMBER SPECIFICALLY EVER TALKING TO PAM OR SONNY ABOUT STRIPPING AND WAXING THE FLOORS, OR GETTING IN THE CONDENSER OR GETTING IN THE HOT WELL CAUSING YOU ADDITIONAL PROBLEMS?

A WHEN I FIRST COME BACK FROM THE SURGERY I HAD BROUGHT THE DOCTOR'S EXCUSE AND IT SAID LIGHT DUTY AND GERARD TOLD ME I COULDN'T WORK, I HAD TO GO BACK TO PAM. I WENT BACK TO PAM AND I CONSULTED MR. DOWNS, TOOK A DESCRIPTION OF MY - A JOB DESCRIPTION AS AN OPERATOR TWO, WHICH IS MY PRIMARY JOB. DOCTOR POPE RELEASED ME TO DO OPERATOR TWO.

Q DID HE IMPOSE ANY RESTRICTIONS LIKE - LIKE YOU ARE TALKING ABOUT SQUATTING OR KNEELING?

A YES, THAT WAS ON THERE. YOU WOULD HAVE TO LOOK AT THE DOCTOR'S EXCUSES.

Q OKAY. THERE WASN'T ANY DISCUSSION ABOUT YOU DOING NINETY PERCENT OF YOUR JOB?

A YES. THAT IS WHAT HE RELEASED ME TO DO WAS NINETY PERCENT AS AN OPERATOR TWO.

Q OKAY. NINETY PERCENT OF OPERATOR TWO. AND HOW DID YOU TAKE THAT TO MEAN?

A I CONSULTED WITH MR. DOWNS ON THAT AND HE SAID THAT WE--

MR. BROUSSARD:

WAIT, WE ARE GOING--

A OH, OKAY. YOU WOULD HAVE TO GET WITH MR. DOWNS ON THAT.

Q WELL, I CAN'T, BECAUSE HE IS YOUR LAWYER AND HE IS GOING TO CLAIM THE PRIVILEGE.

A WELL, I - I CAN'T DISCLOSE THAT. HE IS CLAIM - HE IS CLAIMING A PRIVILEGE TOO.

Q OKAY. WELL, THAT IS FINE. I WAS HOPING WE WOULDN'T GET TO THE POINT OF HAVING TO TALK TO JAM.

MR. BROUSSARD:

I ANTICIPATED THAT COMING UP AND IT JUST - I DON'T KNOW. IT IS SOMETHING I HAVEN'T HAD A CHANCE TO RESEARCH YET, BUT DOWNS OBVIOUSLY MAY BE A FACT WITNESS CONCERNING SOME CONTACTS WITH

* * *

STRIPPING AND WAXNG THE FLOOR WHERE YOUR KNEE SWOLL UP; IS THAT RIGHT?

MR. BROUSSARD:

NO - YEAH, RIGHT.

BY MR. AUZENNE:

Q WELL, I'M NOT TRYING TO TRICK YOU, I'M TRYING TO MAKE SURE I'VE GOT THE SEQUENCE RIGHT. AUGUST 11, 2000---
MR. BROUSSARD:
YEAH, THAT IS RIGHT.
BY MR. AUZENNE.
Q --AND THAT WAS FROM JOHN TO BARRY TO YOU?
A THAT IS CORRECT.
Q AND THAT WAS THE INCIDENT WHERE YOU WERE WORKING OVERTIME AS AN OPERATOR ONE; IS THAT RIGHT?
A THAT IS CORRECT.
Q OKAY. AND HOW ABOUT THIS OTHER INCIDENT, FEBRUARY 3RD OF 2001 ABOUT GETTING INTO THE HOT WELL, WHERE DID THAT ORDER COME FROM?
A WE WASN'T THROUGH WITH THAT ONE.
Q I'M SORRY?
A WE WASN'T THROUGH WITH THE OTHER QUESTION. THERE'S THREE.
Q OKAY. SO HOW ABOUT THE SECOND ONE?
A AND BARRY AND JOHN - GERARD TOLD ME HISSELF THAT HE GAVE JOHN THE ORDER.

* * *

Q OKAY. BEFORE THE STRIPPING AND WAXING IN AUGUST OF 2000 HAD THE ROOF LEAK BEEN FIXED?
A I DON'T KNOW.
Q YOU DON'T KNOW- -
A I DON'T RECALL.
Q WELL, TELL ME THIS,--

MR. BROUSSARD-
YOUR QUESTION ASSUMES THERE WAS A ROOF LEAK.
MR. AUZENNE:
OH, RIGHT. YOU ARE RIGHT, I'M SORRY. LET ME BACK UP.
MR. BROUSSARD: YEAH. BY MR. AUZENNE:
Q WAS THERE A ROOF LEAK IN THE PLANT PRIOR TO AUGUST 11, 2000 THAT NECESSITATED THE FOLKS, THE ROOFERS, ALERT, TO COME AND FIX THE ROOF?
A THERE WAS A ROOF LEAK.
Q OKAY. YOU KNEW ABOUT THAT? YOU OBSERVED IT?
A I DIDN'T REALLY OBSERVE IT, THERE WAS JUST WATER ON THE TURBINE FLOOR.
Q WATER ON THE TURBINE FLOOR. OKAY, AND AT SOME POINT THERE WAS A ROOFING JOB DONE AND THE ROOF - THE LEAK STOPPED?
A YEAH, THEY PUT A NEW ROOF ON.

* * *

A HE SAID IT WAS GOING TO BE BAD ON THE OPERATORS THAT HAD STUFF TO DO WITH THE INVESTIGATION. THE STUFF THAT WAS GOING ON, THAT IS ALL HE WOULD SAY.
Q OKAY. THAT WAS HIS EXACT WORDS TO THE BEST OF YOUR MEMORY WAS THE STUFF WAS GOING ON?
A THAT IS - THAT IS TO THE BEST OF MY MEMORY.
Q HE DIDN'T SAY ANYTHING ABOUT THE ROOF?
A HE SAID FOR THE STUFF THAT WAS GOING ON.

Q OKAY. AND WHAT WAS GOING ON, THE ROOF INVESTIGATION?
A RIGHT.
Q OKAY. AND HE SAID THAT WAS YOU, LANNIS AND FLOYD MCFARLAND?
A WE WAS ALL PRESENT WHEN HE SAID THAT, YES.
Q AND THAT WAS IN THE CONTROL ROOM?
A THAT IS CORRECT.
Q OKAY. ALL RIGHT, WHAT OTHER INCIDENT?
A BEFORE THAT LANNIS AND THEM SAID GERARD HAD TOLD HIM IN THE WATER PLANT. BUT YOU WOULD HAVE TO ASK LANNIS WHAT ALL ACTUALLY WENT - TOOK PLACE.
Q OKAY. SO LANNIS WAS THREATENED OR TALKED TO BY GERARD?
A THAT IS CORRECT.
Q OKAY. I'M TALKING ABOUT YOU, MR. WELLS. LANNIS AND ALL OF THEM, WE ARE GOING TO GET INTO ALL OF THAT. I'M TALKING ABOUT YOU PERSONALLY, AND YOU JUST TOLD ME ABOUT
JOHN. WHAT OTHER INCIDENT?
A THE THREAT ABOUT GOING OVER THEIR HEADS.
Q OKAY. SO THAT WAS THE THREAT RELATED TO THE PHYSICAL THERAPY?
A THAT IS CORRECT.
Q OKAY. WHAT OTHER THREAT?
A OTHER - I DON'T KNOW IF YOU CONSIDER IT A THREAT, BUT IT WAS JUST SOMETHING I DIDN'T AGREE WITH.
Q OKAY. WHAT WAS THAT?

A THAT WAS WHEN JOHN ASKED ME WHEN I HAD MY SURGERY HOW COME I DIDN'T SAY I HURT IT UP THERE.

Q I'M SORRY, SAY THAT AGAIN.

A HE ASKED ME HOW COME I DIDN'T SAY I HAD HURT IT THERE INSTEAD OF USING MY VACATION, AND SICK TIME AND ALL THAT. I JUST TOOK THAT AS SOMETHING THAT WASN'T REAL GOOD.

Q WELL, MAYBE I'M NOT UNDERSTANDING YOU. HURT, HURT IT THERE. WHEN YOU TOOK TIME OFF FOR YOUR SURGERY?

A WHEN I HAD MY SURGERY HE ASKED HOW COME I DID NOT MAKE A CLAIM AGAINST THE CITY.

Q JOHN HAMERNICK TOLD YOU THAT?

A YES, ASKED IT.

Q AND THAT WAS WHEN YOU HAD YOUR KNEE SURGERY?

A YES, WHEN I COME BACK. .

Q OKAY_ SO WHEN YOU RETURNED FROM YOUR KNEE SURGERY. HOW LONG WERE YOU OUT DURING YOUR KNEE SURGERY?

Q. ALL RIGHT. TELL US, IF YOU COULD, A LITTLE BIT ABOUT THE DUTIES OF AN OPERATOR 2?

A. WELL, LIKE I SAID BEFORE, YOU HAVE TO HAVE HIS JOB DESCRIPTION TO UNDERSTAND WHAT THEY ARE. MY INTERPRETATION OF AN OPERATOR 2 WHICH I DON'T HAVE THE JOB DESCRIPTION IN FRONT OF ME -- IS OPERATING THE FIRE BOARD, CONTROL BOARD, THE SWITCHBOARD PUTTING THE UNITS ON AND OFF LINE, AND ANY AND ALL OTHER DUTIES ASSIGNED. YOU HAVE TO TAKE READINGS, MONITOR ALL YOUR EQUIPMENT.

Q. ALL RIGHT . WAS THERE EVER AN OCCASION WHERE AN OPERATOR 2 HAD TO PERFORM CLEANING WORK IN THE HOT WELL UNITS?

A. YES.

Q . WAS THAT A REGULAR PART OF THE OPERATOR 2 JOB?

A. OPERATOR 2'S HAVE DONE IT BEFORE. I AM ASSUMING THAT --WELL, I AM NOT GOING TO SAY I ASSUME. I KNOW THAT WE ASSIST MAINTENANCE. THAT IS PART OF A MAINTENANCE FUNCTION I WOULD SAY.

Q. ALL RIGHT. AND I AM ASSUMING THAT WHEN THIS HOT WELL CLEANING WAS PERFORMED, IT IS WHEN THE PLANT IS NOT GENERATING ELECTRICITY; IS THAT RIGHT? IT IS NOT RUNNING?

A. NORMALLY.

Q. IS THERE A DISTINCT DIFFERENCE BETWEEN THE DUTIES OF AN OPERATOR 2

WHEN THE PLANT IS RUNNING VERSUS WHEN THE PLANT IS NOT RUNNING?

A. YES.

Q. WHAT ARE THEY?

A. HE IS BASICALLY CONFINED TO CONTROL OF OPERATING EQUIPMENT, OPERATING THE BOARD, TAKING HIS READINGS, ADJUSTING VOLTAGE, THINGS OF THAT NATURE.

Q. AND THAT IS WHEN THE PLANT IS RUNNING?

A. YES.

Q. I AM NOT GOING TO ASSUME, BUT WHAT CAN THE OPERATOR 2 DO WHEN THE PLANT IS NOT RUNNING?

A. ASSIST MAINTENANCE. WE HAVE ROUNDS WE HAVE TO MAKE EVERY HOUR TO CHECK EQUIPMENT. THERE HAS BEEN CLEANING THAT WE HAVE DONE, AND PAINTING; JUST A VARIETY OF THINGS.

Q. WE TALKED A LITTLE BIT ABOUT THE HOT WELL. HOW ABOUT THE CONDENSER UNIT? IS THE CONDENSER UNIT MAINTENANCE PERFORMED WHEN THE PLANT IS NOT RUNNING BY OPERATOR 2'S?

A. I GUESS THAT WOULD DEPEND ON WHAT IS GOING ON. IF IT IS AN EMERGENCY AND I GUESS YOU NEED CREWS; THEN YOU WOULD USE WHOEVER IS AT HAND.

Q. ALL RIGHT. INCLUDING OPERATOR 2'S?

A. IF NEED BE-.

Q. I UNDERSTAND THAT THE TUBES IN THE CONDENSER UNIT ARE CHECKED FOR LEAKS WITH AIR WHEN THE PLANT IS NOT

RUNNING. IS THAT ALSO A FUNCTION OF AN OPERATOR 2 IF NECESSARY?

A. IT CAN BE.

Q. HOW ABOUT STRIPPING AND WAXING A FLOOR? IS THAT AN OPERATOR 2 JOB DUTY WHEN THE PLANT IS NOT RUNNING?

A. IT CAN BE.

Q. HOW ABOUT OPERATOR 1'S? IS THERE A DISTINCT JOB DUTY
DIFFERENCE BETWEEN AN OPERATOR 2 AND AN OPERATOR 1?

A. YES.

Q. WHAT IS THAT?

A. AN OPERATOR 1 DOESN'T HAVE ANY FUNCTIONS IN THE CONTROL ROOM, WHERE THEY OPERATE ANY EQUIPMENT IN THERE. HIS JOB IS BASICALLY TO CLEAN, CHECK MOTORS, CHECK OILS, TAKE READINGS, MAKE ADJUSTMENTS WHEN HE IS TOLD, THINGS OF THAT NATURE.

Q. AND A LOT OP THAT ACTIVITY TAKES PLACE OUTSIDE CONTROL ROOM; IS THAT CORRECT?

A. YES.

Q. ALL RIGHT. DO YOU RECALL AN INCIDENT WHERE MR. CHAD WELLS COMPLAINED THAT HIS KNEE WAS GIVING HIM PROBLEMS AFTER WORKING IN THE HOT WELL UNIT?

A. YES.

Q. ALL RIGHT. COULD YOU TELL US WHAT YOU RECALL ABOUT THAT?

A. WHAT I RECALL ABOUT THAT IS CHAD AND LANNIS WAS DOWNSTAIRS WORKING IN THE CONDENSER, AND HE COMPLAINED

SEVERAL TIMES ABOUT HIS KNEE GIVING HIM PROBLEMS. HE CAME BACK UPSTAIRS WHEN WE FINISHED THE JOB A COUPLE OF TIMES AND SHOWED ME THAT HIS KNEE WAS SWOLLEN, AND HE SAID THAT IT WAS HURTING HIM.

Q. ALL RIGHT. ANYTHING ELSE ABOUT THE HOT WELL INCIDENT THAT MR. WELLS EITHER TOLD YOU ABOUT OR YOU LEARNED ABOUT THAT YOU CAN RECALL?

A. I DON'T KNOW WHAT YOU ARE REFERRING TO.

Q. THE INCIDENT ABOUT HIM SHOWING HIS KNEE TO YOU. WAS THAT A ONE-TIME EVENT, OR DID THAT HAPPEN MORE THAN ONCE?

A. IF I AM NOT MISTAKEN, I THINK IT WAS TWICE.

Q. ALL RIGHT.

BUT I COULD BE MISTAKEN OF THE AMOUNT OF TIMES. I AM ALMOST SURE IT WAS TWO TIMES.

Q. ALL RIGHT. AT THAT TIME DID YOU REPORT THE CONDITION OF MR. WELLS OR HIS COMPLAINTS TO ANYONE?

A. YEAH. I THINK WE DID AN INJURY REPORT ONE TIME, AND I TALKED WITH JOHN ABOUT IT, AND I TOLD HIM.

Q. JOHN HAMERNICK?

A. JOHN HAMERNICK.

Q. ALL RIGHT. AND DO YOU RECALL WHAT MR. HAMERNICK SAID OR DID IN RESPONSE TO YOU ---

HE TOLD ME TO MAKE SURE THAT I DID THE INJURY REPORT. AND YOU FILLED THAT OUT?

A. YES.

Q. AND I AM ASSUMING THAT IS THE EMPLOYER REPORT OF INJURY FORM FOR WORKER'S COMP?

A. YES.

Q. WAS THAT IN RESPONSE TO ONE OF THE COMPLAINTS MR. WELLS MADE TO YOU, OR BOTH OF THEM?

A. ONE.

Q. WAS THERE ANOTHER COMPLAINT MADE BY MR. WELLS?

A. YEAH .I KNOW HE SHOWED ME THAT THE KNEE WAS SWOLLEN, BUT WE DIDN'T DO AN INJURY ON THAT ONE.

THAT BUFFER; AND IF I AM NOT MISTAKEN, HE SAID SOMETHING ABOUT THE HOT WELL -- I MEAN THE CONDENSER.

Q. WAS THIS BEFORE OR AFTER THE INCIDENTS WHERE HE WORKED ON THE CONDENSER OR WAXED THE FLOOR?

A. BEFORE.

Q. DID YOU REPORT MR. WELLS' I GUESS LACK OF ABILITY TO ANYONE WHEN HE TOLD YOU?

A. MY SUPERVISORS.

Q. AND THAT WOULD HAVE BEEN MR. ALWELL AND MR. HAMERNICK? A. YES.

Q. ALL RIGHT. WHAT DID YOU TELL MR. ALWELL AND MR. HAMERNICK?

A. I WENT TO THE OFFICE, AND I TOLD THEM THAT CHAD INFORMED ME THAT HE HAD LIMITED DISABILITIES AND THAT THEY -

- IF I AM NOT MISTAKEN, ONE OF THEM TOLD ME THEY HAD TALKED TO MR. SONNY CRAIG, THE UTILITY DIRECTOR, AND THEY SAID THEY WERE INFORMED THAT IF HE COULDN'T PERFORM THE DUTIES, THEN HE HAD TO GO HOME. THEN I INFORMED MR. WELLS, I THINK, AT THAT TIME, AND TOLD HIM THAT WAS THE GUIDELINES WE HAD TO FOLLOW.

Q. WAS THERE EVER AN OCCASION, MR. SIGUR, THAT YOU KNOW ABOUT WHERE MR. WELLS I GUESS MADE A COMPLAINT DIRECTLY TO MR. SONNY CRAIG ABOUT NOT BEING ABLE TO DO PART OF HIS JOB?

A. THERE AGAIN, HE TOLD ME THAT HE DID. LIKE I SAY, THAT WOULD bE FROM WHAT HE TOLD ME.

Q. DO YOU REMEMBER WHAT HE SAID?

A. NOT SPECIFICALLY, BUT HE TOLD ME THAT HE DID TALK TO MR.

* * *

MR. WELLS THAT YOU RECALL?

A. DID I WRITE IT DOWN ANYWHERE?

Q. YES, SIR.

A. NO.

Q. JUST THAT ONE EMPLOYER REPORT OF INJURY THAT YOU TOLD US ABOUT?

A. THAT I CAN RECALL.

Q. ALL RIGHT. MR. SIGUR, ARE YOU AWARE OF THE CITY'S RETURN TO WORK POLICY AFTER AN EMPLOYEE IS INJURED?

A. YES. YOU HAVE TO BE 90 PERCENT -- HAVE TO BE ABLE TO DO 90 PERCENT OF YOUR JOB.

Q. AND WHAT DOES THAT MEAN TO YOU?

A. YOU HAVE TO BE ABLE TO DO 90 PERCENT OF YOUR JOB.
Q. ALL RIGHT. AND OF COURSE A DOCTOR HAS TO SPECIFY THAT? A. YES.
Q. MR. WELLS, AFTER HE HAD HIS KNEE SURGERY, WAS ABLE TO RETURN TO WORK, AND I AM ASSUMING SOMEBODY SAID, "YOU CAN DO 90 PERCENT OF YOUR JOB?"
A. I AM ASSUMING SOMEBODY DID.
Q. DID MR. WELLS EVER DISCUSS WITH YOU ANY LIMITATIONS THAT HIS DOCTOR IMPOSED?
A. BENDING, STOOPING, NO CRAWLING AROUND ON HIS KNEES, NO LONG STANDING.
Q. ANYTHING ELSE?
A. NOT THAT I CAN RECALL.

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OCCUR ON YOUR SHIFT, OR WAS WELLS REPORTING TO YOU WHAT HAD OCCURRED ON ANOTHER SHIFT?
A. NO. I THINK ON MY SHIFT.
Q. AND WHO DID YOU SPEAK WITH THAT ABOUT?
A. I THINK IT WAS GEROD.
Q. WHAT DID YOU TELL HIM?
A. I TOLD HIM WHAT CHAD HAD TOLD ME, THAT THE BUFFER WAS CAUSING PROBLEMS WITH HIS LEG.
Q. WHAT DID GEROD SAY?
A. I THINK THERE AGAIN HE TOLD ME THAT IF HE COULDN'T PERFORM HIS DUTY DUTIES, HE COULD ALWAYS GO HOME.
Q. THAT STATEMENT CAN BE TAKEN A LOT OF DIFFERENT WAYS. IF I COME TO YOU AND

SAY, "LOOK, I GOT IN A CAR WRECK YESTERDAY. I THOUGHT I COULD GET MY JOB DONE, BUT IT IS KILLING ME." ARE YOU GOING TO TELL ME, "IF YOU CAN'T DO YOUR WORK, GO HOME?"

A. IF YOU ARE ASKING ME A HYPOTHETICAL QUESTION, I AM NOT GOING TO ANSWER THAT ONE.

Q. HAS ANYBODY EVER COME TO YOU AND SAID, " I CAN'T DO MY WORK DO DAY BECAUSE OF" -- FILL IN THE BLANK -- ULCERS, BAD TOES, SOME KIND OF PHYSICAL AILMENT?

A. NOT THAT I CAN RECALL.

Q. WHAT WAS PREVENTING CHAD FROM GOING HOME IF HE COULDN'T DO THE WORK?

A. THERE AGAIN, I DON'T KNOW.

Q. THE MANNER IN WHICH THE STATEMENT APPARENTLY WAS MADE, "IF

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A. YES, UNLESS YOU NEED TO TAKE CORRECTIVE ACTION OUTSIDE THE CONTROL ROOM. LIKE I SAID, WITH ANOTHER OPERATOR 2 THERE OR ANOTHER SENIOR OPERATOR WOULD BE THE ONLY WAY YOU WOULD BE ABLE TO LEAVE.

Q. WHEN THE PLANT IS RUNNING, HAVE YOU EVER -- HOW LONG HAVE YOU WORKED OUT THERE?

A. SINCE NOVEMBER OF '82.

Q. DURING YOUR TIME, HAVE YOU EVER WHILE THE PLANT WAS RUNNING HAD AN OPERATOR CALLED IN FROM THEIR DAY OFF TO STRIP AND WAX THE FLOOR?

A. HAVE I HAD ONE TO CALL IN ---

Q. HAVE YOU EVER SEEN THAT HAPPEN?

A. CALLED IN TO SPECIFICALLY DO THAT?
Q. YES.
A.. NO, NOT THAT I REMEMBER.
Q. MR. ALWELL OR JOHN, DID YOU EVER HAS EVER EITHER ONE OF THEM REQUEST THAT YOU SPECIFICALLY ASSIGN DUTIES TO MR. WELLS?
A YES.
Q. WHAT WERE THE DUTIES THAT THEY WANTED YOU TO SPECIFICALLY ASSIGN -- OR WHO WAS IT, AND WHAT WERE THE DUTIES?
A. THERE AGAIN, I DON'T REMEMBER SPECIFICALLY WHAT IT WAS, BUT I KNOW I HAVE HAD CONVERSATION WITH THEM, AND THERE AGAIN IT WENT BACK TO THE KNEE ISSUE, THAT HE HAD TO BE ABLE TO DO HIS JOB.
Q. DO YOU RECALL IF THAT HAD TO DO WITH CLEANING THE CONDENSER, OR THE HOT WELL, OR STRIPPING AND WAXING, ANY OF THOSE THREE?

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A. I AM SURE ONE OF THOSE PROBABLY.
Q. YOU THERE WAS SOMETHING TO DO WITH THE KNEE INCIDENT. I WANT TO BE SURE YOU UNDERSTAND ME. I AM ASKING IF EITHER GEROD OR JOHN TOLD YOU TOASSIGN CHAD TO A SPECIFIC DUTY IN ONE OF THOSE THREE CATEGORIES THAT WE HAVE TALKED ABOUT?
A. I KNOW THE CONDENSER.
Q. AND THIS WAS AFTER HIS SURGERY?
A. YES.
Q. DID THEY TELL YOU WHY THEY WANTED HIM TO DO IT?

A. THEY SAID WE NEEDED TO GET IT DONE.
Q. AND THEY SPECIFICALLY TOLD YOU TO USE HIM?
A. I ONLY HAD TWO OPERATORS ON MY SHIFT, AND IT WAS LANNIS DAY AND CHAD WELLS.
Q. I UNDERSTAND, BUT DID THEY SPECIFICALLY MENTION CHAD BY NAME, THAT THEY WANTED HIM TO DO IT?
A. YES.
Q. WHEN YOU WERE AN OPERATOR, DID YOU EVER CLEAN THE HOT WELL?
A. TO BE HONEST WITH YOU, DAN, I DON'T THINK I EVER DID.
Q. HOW LONG HAVE YOU BEEN IN THE UNION?
A. HOW LONG HAVE I BEEN IN T HE UNION?
Q. YES.
A. PROBABLY SINCE NOVEMBER, OF '82.
Q. ALL RIGHT. HAVE YOU EVER HAD THE QUESTION COME UP WHERE AN EMPLOYEE WAS TOLD, "IF YOU CAN'T DO YOUR JOB, GO HOME," WHILE YOU WERE IN THE UNION?

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A. HAVE I EVER HAD THAT?
Q. YES, WHERE AN EMPLOYEE WAS TOLD, "IF YOU CAN'T DO YOUR JOB, GO HOME?"
A. I HAVE NEVER HANDLED A GRIEVANCE LIKE THAT, NO.
Q. IN YOUR EXPERIENCE IN HANDLING UNION GRIEVANCES AND ALSO AS A SUPERVISOR., WHAT DOES THAT MEAN TO

YOU WHEN THAT STATEMENT IS MADE, "IF YOU CAN'T DO THE JOB, GO HOME?"

A. IF HE CAN'T PERFORM THE WORK, THEN HE HAS A CHOICE TO GO HOME OR DO THE WORK.

Q. ARE WE TALKING ABOUT TAKE LEAVE AND GO HOME, OR ARE WE TALKING ABOUT --

A. YES. YOU WOULD HAVE TO TAKE YOUR PERSONAL TIME.

Q. SO YOU WOULDN'T RECEIVE PAY WHILE YOU WERE AT HOME?

A. IF YOU CHOSE NOT TO USE YOUR PERSONAL TIME.

Q. WERE YOU AWARE OF THE RESTRICTIONS THAT HE HAD AFTER HE CAME BACK FROM SURGERY?

A. YES. I HAVE ALREADY ANSWERED THAT ONE.

Q. WAS JOHN AND GEROD AWARE OF THOSE RESTRICTIONS?

A. YES. TO MY KNOWLEDGE, YES.

Q. DID YOU EVER SEE HIS LEG SWOLLEN?

A. YES.

Q. I THINK THINK YOU SAID YOU FILLED OUT AN ACCIDENT REPORT; IS THAT CORRECT?

A. YES.

Q. ARE YOU AWARE OF HIM HAVING ANY DIFFICULTY GOING TO PHYSICAL

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A. AFTER CHAD HAD THE SURGERY, CHAD AND LANNIS DAY DID IT, AND I WOULD RELIEVE. LIKE I SAID, I HAAVE BEEN DOWN THERE BEFORE AND WATCHED THE DOOR WHEN MAINTENANCE HAS DONE IT.

Q. YOU SAY YOU WORKED RELIEF. FOR CHAD, FOR LANNIS OR WHO?
A. WHOEVER NEEDED IT AT THE TIME.
Q. DID IT APPEAR THAT THAT KIND OF WORK IN THE CONDENSER WOULD PLAY SOME SORT OF PART ON THE KNEE?
A. YES. YOU HAVE, TO CROUCH IN THERE, AND GET IN THERE, AND FIT IN THERE THE BEST WAY YOU CAN TO GET TO THE TUBES YOU NEED TO GET TO.
Q. IT IS PRETTY CONGESTED AND TIGHT?
A. YES.
Q. HOW WOULD YOU DESCRIBE THE RELATIONSHIP BETWEEN CHAD AND GEROD ? I WILL TAKE HIM FIRST, AND THEN I WILL TAKE JOHN SECOND?
A. AT WHAT POINT IN TIME?
Q. FROM THE TIME HE HAD HIS SURGERY UNTIL HE LEFT. AND THIS IS BASED ON YOUR OWN OBSERVATION .
A. I WOULD SAY STRAINED, NOT VERY GOOD.
Q. AND WHAT EVENTS WOULD HAPPEN THAT BROUGHT YOU TO THAT CONCLUSION?
A. IT WAS JUST CONTROVERSY ABOUT DIFFERENT THINGS.
Q. WHAT ABOUT CHAD AND JOHN? HOW DID THEY GET ALONG?
A. ABOUT THE SAME.
Q. DID YOU EVER SEE CHAD AND JOHN EXCHANGE WORDS?
A. YES.

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I REMEMBER HOW LONG CHAD HAS BEEN GONE.

Q. IF I TOLD YOU HE LEFT THE CITY IN APRIL OF 2001 -- LET'S START WITH 2001
A. WE WAS WORKING TOGETHER WHEN HE LEFT, IF THAT WILL HELP YOU.
Q. THAT WILL. WHO WAS YOUR SHIFT SUPERVISOR?
A. I WAS WORKING IN WATER TREATMENT, AND BARRY TYLER WAS THE SHIFT SUPERVISOR.
Q. ALL RIGHT. NOW, DO YOU UNDERSTAND THAT MR. WELLS HAS FILED A LAWSUIT AGAINST THE CITY?
A . YES, I UNDERSTAND.
Q. I AM NOT TRYING TO I GUESS IMPLANT ANYTHING IN YOUR MIND. JUST TELL ME IN YOUR WORDS WHAT YOU UNDERSTAND THE SUIT IS ABOUT?
A. I UNDERSTAND THAT CHAD CAME BACK TO WORK AFTER SURGERY, AND HE HAD TO DO JOB DUTIES THAT HURT HIS LEG. THAT IS WHAT I HEARD ABOUT IT.
Q. ALL RIGHT. IS THERE ANYTHING ELSE ABOUT THE SUIT THAT YOU KNOW OF?
A. NO. NOT REALLY.
Q. ALL RIGHT. DO YOU KNOW WHAT JOB DUTIES SPECIFICALLY HURT MR. WELLS' LEG?

A. WELL, WE CLEANED OUT THE HOT WELL, AND WORKED IN THE CONDENSER, AND ALSO MOPPING AND WAXING FLOORS.
Q. YOU SAID "WE". DOES THAT MEAN YOU DID THAT WORK AS WELL? A. YES.

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CHECKING THE TUBES. SO ONE WOULD BE ON ONE SIDE, AND ONE WOULD BE THE OTHER SIDE. YOU HAVE GOT TO KEEP UP WITH WHAT TUBE YOU WERE ON, WHICH IS NOT HARD TO DO. ONE HAS A GAUGE AND PUTS AIR IN, AND YOU SEE HOW LOW LONG IT HOLDS. IF IT HOLDS AIR, IT IS NOT LEAKING. IT IS A BASIC CHECK.
Q. AND YOU AND MR. WELLS DID THAT AT SOME POINT AFTER HIS SURGERY?
A. RIGHT.
Q. AND DID MR. WELLS COMPLAIN TO YOU ABOUT PROBLEMS RELATED TO THAT JOB?
A. YES. THAT IS ANOTHER JOB THAT' IS CONFINED WHERE YOU CAN'T STAND UP. IT IS AN AWKWARD PLACE TO WORK AT.
Q. I MAY BE CONFUSED, BUT I WAS UNDER THE IMPRESSION THAT IN THE CONDENSER USE, ON ONE SIDE A MAN CAN STAND UP FULLY, BUT ON THE OTHER SIDE IT TS SHORT. IS THAT RIGHT, OR AM I THINKING OF THE HOT WELL?

A. ONE SIDE IS DIFFERENT THAN THE OTHER. I CAN'T REMEMBER WHICH ONE WHETHER IT IS THE RIGHT OR THE LEFT. ON ONE SIDE YOU HAVE MORE ROOM, BUT ON EITHER SIDE IT IS NOT REALLY EASY.
Q. AND SPECIFICALLY WHAT DID MR. WELLS SAY ABOUT PROBLEMS RELATED TO DOING WORK IN THE CONDENSER UNIT?
A. WELL, HE HAD THE SAME PROBLEM WITH HIS KNEE.
Q. KNEELING DOWN?
A. ON HIS KNEE.
Q. COULDN'T KNEEL DOWN, ALL RIGHT. HOW ABOUT MOPPING AND

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Q. ALL RIGHT. AND YOUR SHIFT SUPERVISOR WAS WHO?
A.. HIS WAS BARRY TYLER. I WAS WORKING IN WATER TREATMENT, BUT'
YOU HAVE GOT TO REALIZE IT IS ALL IN THE SAME AREA.
Q. ALL RIGTH. WHAT DID YOU SEE?
A. HE WAS WAXING THE FLOOR.
Q. "HE BEING MR. WELLS?,
A. RIGHT.
Q. DID MR. WELLS SAY ANYTHING TO YOU ABOUT WHILE HE WAS WAXING THE FLOOR ABOUT HAVING PROBLEMS WITH IT?
A. YEAH , I HEARD THERE WAS A RUCKUS ABOUT IT. I THINK THEY CALLED CITY HALL.
Q. WHO DID?
A. MR. WELLS.
Q. ALL RIGHT. DO YOU KNOW WHAT HAPPENED AFTER THE CALL TO CITY HALL?

A. MY UNDERSTANDING IS THEY TOLD HIM EITHER DO THE JOB OR GO HOME.
Q. ALL RIGHT. AND WHAT DID THAT MEAN TO YOU?
A. THAT HE HAD TO CONTINUE DOING THE FLOOR OR GO HOME.
Q. NOT THAT HE WAS TERMINATED, BUT THAT HE WOULD HAVE TO GO HOME?
A. RIGHT.
Q. WAS MR. WELLS WORKING OVERTIME THAT DAY WHEN HE STRIPPED AND WAXED THE FLOOR, OR DO YOU KNOW?
A. HE WAS WORKING OVERTIME. HE WAS OILING THAT DAY .

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YOU HAVE GOT TO UNDERSTAND, MR. BROUSSARD, THAT IS MOSTLY HEARSAY. I WAS NOT IN THE OFFICE AND DIDN'T OVERHEAR IT.
Q. WHAT JOB ARE WE TALKING ABOUT?
A. THAT WAS -- THE THING I WAS REFERRING TO WAS ON THE FRIDAY WHEN THEY HAD HIM WAXING THE FLOOR.
Q. ALL RIGHT. NOW , THAT WAS AFTER HIS SURGERY; IS THAT RIGHT? A. RIGHT.
Q. AND THE PLANT WAS RUNNING AT THAT TIME?
A. YES, SIR.
Q. IS THAT NORMAL POLICY, TO HAVE AN OPERATOR STRIP AND WAX THE FLOOR WHILE THE PLANT IS RUNNING?
A. NO, SIR. I HAD NEVER SEEN IT DONE BEFORE.

Q. DID YOU TALK TO BARRY TYLER AFTER THAT INCIDENT ABOUT CHAD BEING ASSIGNED THAT DUTY?
A. WE HAD A DISCUSSION ABOUT IT.
Q. AND WHAT WAS THE NATURE OF THAT DISCUSSION?
A. I TOLD HIM I FIGURED THAT THE OILER SHOULD BE DOING THE OILER'S JOB WHEN WE WERE RUNNING.
Q. WHAT DO YOU MEAN BY THAT?
A. HE WAS SUPPOSED TO BE DOING THE OILER'S WORK, WHICH THAT IS CHECKING THAT ALL THE EQUIPMENT IS RUNNING, AND DOING HIS ROUNDS AND WHATEVER, NOT MOPPING AND WAXING THE FLOOR.
Q. DO YOU KNOW WHO ASSIGNED HIM TO MOP AND WAX THE FLOOR?
A. NO, I DON'T.
Q. DID CHAD EVER TELL YOU WHO ASSIGNED HIM TO DO IT?
Q. DID YOU EVER HEAR JOHN SAY TO EITHER YOU OR IN GEROD'S PRESENCE THAT THEY WERE GO ING TO GET EVEN WITH THE OPERATORS FOR THE INVESTIGATI0N?
A. I THINK ONE DAY UP THERE MCFARLAND AND MYSELF WAS IN THE CONTROL ROOM WITH CHAD -- I DIDN'T EVEN KNOW WHAT WAS GOING ON. I TOLD JOHN I DIDN'T KNOW WHAT WAS GOING ON. I HONESTLY DIDN'T KNOW. AND THERE WAS WAS GOING TO BE A TRICKLE DOWN EFFECT.
MR. CALVIT: WHO IS "HE"?
THE WITNESS: JOHN HAMERNICK.
BY MR. BROUSSARD:

Q. HE SAID THERE WAS GOING TO BE A TRICKLE DOWN EFFECT?
A. YEAH. GEROD ASKED ME ONE TIME -- BEING YOU BROUGHT THAT UP -- ABOUT THAT, AND I TOLD HIM I DIDN'T KNOW A THING ABOUT IT. GEROD KNOWS HOW I AM. I DON'T TAKE MUCH FROM NOBODY, AND HE KNOWS. I WILL TELL YOU THE TRUTH STRAIGHT UP. I TOLD GEROD, " I DON' T KNOW ANYTHING ABOUT IT, I HAD NOTHING To DO WITH THIS AND DON'T KNOW WHAT YOU ARE TALKING ABOUT." THEN WE WERE INTERRUPTED BY ROY BELLAMY THAT AFTERNOON AFTER JUST A FEW WORDS SAID.
Q. WHAT ABOUT WHEN YOU HAD THIS CONVERSATION WITH JOHN HAMERNICK? WAS CHAD THERE?
A. YES, CHAD WAS THERE, AND FLOYD MCFARLAND WAS THERE.
Q. AND YOURSELF?
A . AND MYSELF' IN THE CONTROL ROOM.
Q. AND WHAT IS YOUR RECOLLECTION OF WHAT TOOK PLACE IN THAT CONVERSATION?
A. WELL, I DIDN'T UNDERSTAND WHAT WAS GOING ON BECAUSE I DIDN'T KNOW ANYTHING ABOUT IT.
Q. I UNDERSTAND.
A. AND I TOLD JOHN I DIDN'T KNOW WHAT HE WAS TALKING ABOUT. HE SAID, "WELL, WHOEVER IS INVOLVED IN IT, THERE IS GOING TO BE A TRICKLE DOWN EFFECT, " WHATEVER THAT MEANS, AND THAT IS ABOUT ALL THAT WAS SAID

Q. DID HE SPECIFICALLY SAY THAT HE WAS GOING TO GET EVEN WITH THE OPERATORS?
A. WELL, I ASSUMED THAT IS WHAT HE MEANT.
Q. THAT WAS THE DISCUSSION ABOUT THE INVESTIGATION?
A. YEAH. I DIDN'T KNOW ANYTHING ABOUT IT. I WAS IN THE DARK.
Q. NOBODY HAD EVER TOLD YOU --
MR. BROUSSARD: STACEY, HAND HIM THAT FIRST PICTURE.
MR. AUZENNE: (HANDING) BY MR. BROUSSARD:
HAVE YOU EVER SEEN THESE PICTURES BEFORE TODAY? I HAVE MARKED THEM AT NUMBER 1.
A. (WITNESS EXAMINED EXHIBIT) NO, I HAVEN'T SEEN THEM.
Q. HAVE YOU HEARD ABOUT THEM?
A. I HEARD ABOUT THE PICTURES.
Q. BUT THIS IS THE FIRST TIME YOU HAVE EVER SEEN THEM?
A. I THINK THIS IS THE FIRST TIME I HAVE SEEN THE PICTURES.
A. I WOULDN'T THNK SO, YES. THERE SHOULD BE.
Q. AND SO THAT IS PART OF THE PROCESS, AS YOU UNDERSTAND IT, IN COMING BACK FROM SOME KIND OF PHYSICAL PROBLEM?
A. RIGHT. IT WAS COMMON KNOWLEDGE THAT HE HAD KNEE SURGERY.
Q. SO YOU ARE MAKING AN ASSUMPTION THAT GEROD AND JOHN HAD SOME

PAPERWORK DEALING WITH CHAD'S PROBLEM?

A. I KNEW THEY HAD KNOWLEDGE THAT HE HAD KNEE SURGERY.

Q. AND SO UNDER THE NORMAL PROCESS, SOMETHING SHOULD HAVE COME ACROSS JOHN AND GEROD'S DESK CONCERNING CHAD?

A. RIGHT.

Q. BUT AS FAR AS SPECIFICALLY KNOWING RETURN TO WORK SHEETS AND WHAT GEROD KNEW OR DIDN'T KNOW, YOU DON'T HAVE ANY KNOWLEDGE ABOUT THE SPECIFICS?

A. NO, I DIDN'T READ NOTHING ABOUT THAT.

Q. ALL RIGHT. THEN LET'S GO TO PAGE 7 NOW.

A. (WITNESS COMPLIED)

Q. I THINK: THAT WHEN MR. BROUSSARD WAS QUESTIONING YOU ABOUT DISCUSSIONS WITH GEROD, YOU ENDED UP MENTIONING THIS CONVERSATION. IS THIS THE ONE YOU WERE REFERRING TO WHEN YOU SPOKE WITH MR. BROUSSARD?

A. RIGHT. GEROD ASKED ME -- HE DIDN'T TELL ME WHAT IT WAS ABOUT. HE SAID THERE WAS SOME KIND OF INVESTIGATION, AND I TOLD GEROD I DIDN'T KNOW ANYTHING ABOUT IT. I DIDN'T THINK HE BELIEVED ME, BUT I DIDN'T. THEN JOHN ASKED ME LATER, AND THAT IS WHEN WE WERE IN THE CONTROL ROOM RIGHT THERE.

A. WELL, YOU JUST DID WHATEVER THEY TOLD YOU TO DO.

Q. ALL RIGHT. DO YOU RECALL SPECIFICALLY HAVING TO CLEAN THAT TURBINE FLOOR WHILE THE PLANT WAS RUNNING?
A. YES, I HAVE.
Q. DID YOU DO THAT AS AN OPERATOR 2?
A. YES.
Q. ALL RIGHT. LET ME TURN YOUR ATTENTION TO WHEN MR. WELLS WAS WORKING FOR THE CITY, MR. SAMPRACT. DO YOU RECALL - - AND I AM NOT SURE OF THE DATES -- YOU MAY HAVE ALREADY BEEN RETIRED, BUT I AM GOING TO GO AHEAD AND ASK YOU ANYWAY . DO YOU RECALL ANY INCIDENTS INVOLVING MR. WELLS COMPLAINING OF KNEE PAIN RELATED TO HIM HAVING TO GO INTO THE CONDENSER UNITS OR HOT WELL UNITS?
A. YES, HE DID.
Q. COULD YOU TELL US WHAT HE TOLD YOU OR WHAT YOU LEARNED ABOUT THAT?
A. WELL, HE HAD HAD SURGERY OR SOMETHING ON HIS KNEE, AND WHEN HE CAME IN TO WORK ONE DAY, HE WAS TOLD THAT HE HAD TO DO THE COMPLETE BUFFING THE FLOORS, AND HIS KNEE -- HE WAS UNDER A DOCTOR'S CARE APPARENTLY WHERE HE WASN'T SUPPOSED TO BE REALLY DOING ANY STRENUOUS WORK ON THE KNEE. HOWEVER, HE DID GO ON OUT AND DO AS HE WAS TOLD, AND THE WORK AGGRAVATED THE KNEE, AND HE CAME BACK IN AND COMPLAINED ABOUT IT.

Q. ALL RIGHT. DO YOU KNOW IF MR. WELLS MISSED ANY WORK AS A RESULT OF HIS PROBLEM?

A. I DO BELIEVE HE DID.

WELLS AND MR. ALWELL?

A. IT WASN'T TOO GOOD BETWEEN THEM. THEY DIDN'T HAVE THE BEST Or RELATIONSHIP, I WOULD SAY.

Q. DO YOU KNOW OF ANY ONE EVENT THAT MAY HAVE CAUSED THIS TENSION, OR WAS THERE A SERIES OF EVENTS?

A. WELL, I REALLY COULDN'T SAY. I WASN'T ASSIGNED TO A SHIFT WITH CHAD TO KNOW ABOUT EVERYTHING THAT WENT ON. MOST OF THE TIME IT WAS LIKE WHAT WAS PASSED ON FROM THE NEXT OPERATOR THAT TOLD YOU ABOUT -- YOU KNOW, RELIEVING THE NEXT GUY AND HE WOULD TELL YOU WHAT WENT ON THAT DAY, AND A LOT OF TIMES YOU WOULD HEAR ABOUT THINGS THAT HAD HAPPENED WITH HIM ON THE SHIFT.

Q. DO YOU RECALL ANY SPECIFIC EVENTS THAT HAPPENED EITHER BETWEEN MR. ALWELL AND MR. WELLS OR MR. HAMERNICK AND MR. WELLS THAT YOU THINK MAYBE COULD HAVE FORMED THE BASIS FOR THIS LAWSUIT?

A. I THINK THE BIGGEST ISSUE WAS WHEN CHAD'S KNEE WAS MESSED UP, AND HE HAD THERAPY. HE WAS ON SOME MEDICATION, AND THEY HAD TOLD HIM NOT TO APPARENTLY USE THAT -- PUT ANY WEIGHT OR PRESSURE ON HIS KNEE. HOWEVER, THE WAY THE CITY HAD ITS POLICIES, THEY

DIDN'T HAVE ANY LIGHT DUTY POLICY SO THAT HE EITHER WOULDN'T COME TO WORK - - ACTUALLY HE WASN'T SUPPOSED TO COME TO WORK - - OR YOU WOULD COME BACK AND YOU WOULD BE ELIGIBLE TO DO WORK AT YOUR FULL DUTY.

Q. SO IN OTHER WORDS, A MAN NEEDED TO BE ABLE TO DO HIS FULL JOB BEFORE HE COULD RETURN TO WORK? THAT IS GENERALLY THE CITY'S
RIGHT.

Q. I HAVE HEARD SOMETHING THAT THE CITY REQUIRED ALL EMPLOYEE BE ABLE TO DO 90 PERCENT OF HIS JOB -IN ORDER TO RETURN FROM AN INJURE. WAS THAT YOUR UNDERSTANDING OF TT?

A. SOMEWHAT, YES.

Q . I HAVE HEARD ABOUT SEVERAL INCIDENTS BETWEEN MR. WELLS AND MR. ALWELL , ONE OF THEM INVOLVING A POTATO. DID YOU KNOW ANYTHING ABOUT THAT?

A. A POTATO?

Q. MR. WELLS GOING OUT AND PICKING UP LUNCH AND NOT PICKING UP
MR. ALWELL'S POTATO? DID YOU KNOW ANYTHING ABOUT THAT?

A. THEY HAD A LOT OF THAT GOING ON AROUND THERE WHERE IF THEY DIDN'T GO PICK UP HIS LUNCH, HE WOULD HAVE AN ATTITUDE ABOUT IT; CHILDISH STUFF.

Q. HOW ABOUT THE NEWSPAPER; THAT MR. WELLS WOULD THROW THE NEWSPAPER AWAY, AND MR. ALWELL WOULD GET UPSET?

A. YES, THAT IS TRUE.

Q. THE OTHER ONE I HEARD ABOUT WAS APPARENTLY INVOLVING MR. ALWELL AND SOME ROOFING MATERIALS. DO YOU KNOW ANYTHING ABOUT THAT?
A. THE ROOFING MATERIAL, I TOOK PICTURES OF MR. ALWELL TAKING SOME MATERIAL FROM THE ROOF ONE TIME.
Q. WOULD THOSE BE THE PICTURE? (HANDING)
A. (WITNESS EXAMINED EXHIBITS) THOSE WOULD BE THE PHOTOS

MATERIALS THAT WAS LEFT AT THE PLANT -- I AM TALKING ABOUT THE ELECTRICAL PRODUCTION PLANT WHEN I SAY "PLANT"--
A. RIGHT.
Q. WOULD YOU TELL US ABOUT THAT?
A. WHAT DO YOU WANT TO KNOW?
Q. WELL, AS I UNDERSTAND IT, THERE WERE SOME ALLEGATIONS THATMR. ALWELL OR MR. HAMERNICKERNICK MAY HAVE BEEN TAKING SOME OF THIS ROOFING MATERIAL WITHOUT PERMISSION?
A. RIGHT.
Q. AS I UNDERSTAND IT, EITHER YOU, OR MR. WELLS OR SOME COMBINATION REPORTED THEIR ACTIONS TO THE STATE POLICE?
A. RIGHT.
Q. DO YOU REMEMBER WHO YOU REPORTED, IF IN FACT YOU REPORTED, THAT PROBLEM TO?
A. THE NAME, NO.
Q. BUT YOU DID TALK TO SOMEBODY AT STATE POLICE ABOUT THIS?

A. YES.
Q. I ALSO UNCERSTAND THERE WERE SOME PICTURES TAKEN OF MR. ALWELL I BELIEVE TALKING SOME MATERIAL FROM THE PLANT?
A. RIGHT.
Q. DO YOU REMEMBER WHO TOOK THOSE PICTURES? A. (NO RESPONSE)
Q. WOULD JERRY SAMPRACT BE THE PERSON?
A. I THINK IT WAS. HE MAY HAVE HAD HIS DIGITAL CAMERA THERE. I DON'T KNOW, TO TELL YOU THE TRUTH, THAT WE EVEN TOOK THEM FOR
APOLOGIZE.
MR. BROUSSARD: YOU SAID THEFT.
MR. AUZENNE: ALL RIGHT. WELL, LET ME SAY REMOVAL OF THE MATERIAL".
BY MR. BROUSSARD:
Q. DID YOU REPORT THIS REMOVAL TO STATE POLICE ALONE, OR DID SOMEONE GO WITH YOU? .
A. NO. SOMEBODY WENT WITH ME.
Q. WHO?
A. ME AND CHAD.
Q. SO YOU ALL WENT TOGETHER? A. YES.
Q. DID YOU ALL DISCUSS THE INCIDENT BEFORE YOU WENT TO STATE POLICE?
A. PROBABLY. WASN'T SURE, YOU KNOW IF IT WAS -- WHAT IT WAS, HOW TO DO IT. YES, I GUESS YOU WOULD SAY WE DISCUSSED IT.
Q. WOULD YOU TELL ME WHAT YOU RECALL ABOUT THE DISCUSSION BETWEEN YOU AND MR. WELLS?

A. THAT I DON'T KNOW. I COULDN'T TELL YOU WORD FOR WORD.

Q. JUST GENERALLY?

A. YOU KNOW, IF IT WAS -- WHAT DO YOU CALL IT --- I AM TRYING TO THINK OF THE WORD ---

Q. PROPER PERHAPS?

A. NO, NOT PROPER. DID WE HAVE A CASE. I CAN THINK OF THE WORD. CAN WE DO IT, TO DO IT."DO WE HAVE A CASE TO DO IT OR YOU TOLD HIM? IF I START SUGGESTING THINGS, YOU COULD SAY, "OH, YES, THAT IS IT," AND I DON'T WANT TO DO THAT. I WANT TO KNOW WHAT YOU REMEMBER ABOUT WHAT YOU TOLD GEROD ABOUT YOUR ROLE IN THE INVESTIGATION?

A. WELL, HE WAS MAD, BUT I TOLD HIM WHY, AND I TOLD HIM --

Q. WELL, TELL ME WHY?

A. OVER AN INCIDENT, PRIOR TO THAT, HE HAD MORE OR LESS GOT ME UP TO CITY HALL OVER SOMETHING I THOUGHT WAS NOT RIGHT. I MIGHT HAVE BEEN WRONG IN IT MYSELF, BUT THE WAY IT WAS DONE, I DIDN'T THINK 1T WAS RIGHT.

Q. DID YOU HARBOR A GRUDGE ABOUT THAT?

A. DEFINITELY. I TOLD HIM THAT.

Q. AND THEN THIS STATE POLICE THING, WHEN IT CAME UP, IN YOUR MIND DID IT COME TO YOUR. ATTENTION THAT THIS MAY BE A WAY TO GET THE GRUDGE EVEN?

A. THE WAY HE TREATED ME, AND I DIDN'T THINK THAT WAS GOING ON AND HE SHOULD BE DOING 'THAT, YES.

Q. ALL RIGHT. AND YOU OWNED UP TO THAT TO GEROD; DIDN'T YOU?
A. I SURE DID.
Q. AND WHAT HAPPENED AFTER THAT?
A. WE ARE ALL HUNKY -DORY NOW AS FAR AS I KNOW. IT IS OVER WITH ME.
Q. DID GEROD DO ANYTHING TO YOU AFTER YOU OWNED UP TO WHAT PART YOU PLAYED IN THE EVENT?
A. NO, NOT THAT I KNOW OF, UNLESS HE DID SOMETHING I DIDN'T KNOW OF.
A. WELL, YOU WOULD FIND OUT ABOUT IT IF HE CHANGED YOUR SHIFT OR MAD YOU WORK NIGHTS?
A. RIGHT. NOTHING OF THAT NATURE.
Q. DO YOU FEEL THAT CLEARING THE AIR WITH HIM ON THE OCCASION THAT YOU DID RESOLVED THE MATTER?
A. AS FAR AS IT SEEMS RIGHT NOW, YES.
Q. HOW LONG AGO WAS THAT?
A. I DON'T KNOW. IT HAS BEEN YEARS.
Q. SO IN THE TIME SINCE THEN, NOTHING HAS OCCURRED TO YOU THAT YOU RELATE TO ANY KIND OF
RETALIATION AGAINST YOU FOR SPEAKING YOUR MIND?
A. NO.
Q. EXCUSE ME?
A. NO.
Q. YOU HAD MENTIONED THAT YOU HAD SPOKEN WITH SOMEONE ON THE PHONE THAT YOU UNDERSTOOD TO BE WORKING FOR OR WITH CHAD'S ATTORNEY?
A. YES. HE WAS THE FIRST CONTACT, I BELIEVE, EVER OF ANYTHING.

Q. DID CHAD OR SOMEONE WITH -- CHAD OR THE ATTORNEY -- GET IN TOUCH WITH YOU IN ADVANCE AND SAY, "HEY, SOMEONE IS GOING TO TALK TO YOU ABOUT THE DEAL?"
A. I AM NOT SURE. THEY MAY HAVE. I AM TRYING TO THINK- IT MAY HAVE. I DON'T KNOW. THIS GUY JUST CALLED ME ONE DAY AND
Q. YES.
A. I DON'T KNOW THE DATE. IT HAS BEEN A YEAR OR BETTER.
Q. WAS IT BEFORE OR AFTER AUGUST OF 2001, WHICH WOULD BE ABOUT A YEAR AND A HALF AGO?
A. TO TELL YOU THE TRUTH, I COULDN'T ANSWER YOU.
Q. AND HOW DID THAT MEETING COME ABOUT?
A. I DON'T KNOW IF HE JUST CALLED ME OVER THERE OR IF I HAPPENED TO BE -- I THINK HE CALLED ME OVER THERE TO TALK TO ME ABOUT IT,I BELIEVE.IT WAS JUST HIM AND GEROD.
Q. YOU SAY "HE". HE CALLED YOU OVER THERE. YOU ARE TALKING ABOUT MR. ALWELL CALLED YOU WHERE?
A. TO HIS OFFICE.
Q. YOU WERE ON DUTY AT THE TIME?
A. YES.
Q. AND WHAT WAS DISCUSSED AT THAT TIME WHERE YOU ALL ALLEGEDLY MADE UP?
A. I MEAN WE DIDN'T KISS AND MAKE UP.
Q. I WAS WONDERING. I DIDN'T KNOW WHAT WAS GOING ON.

A. WE JUST DISCUSSED IT, AND I GUESS I JUST FINALLY COME OUT
AND TOLD HIM MY PART IN IT,WHY I DID IT, AND THAT WAS IT.I MEAN I DIDN'T HAVE NOTHING - - IT HAD KIND OF ALL WORKED UP OVER THE YEARS, AND HE PROBABLY KNOWS TOO, BECAUSE I THINK HE SAID SOMETHING TO THE FACT BEFORE THAT JUST THE WAY THINGS WERE GOING, THE WAY THINGS WERE DONE, A LOT OF PEOPLE WERE MAD. I DON'T KNOW THE EXACT REASON WHY, WHAT WOULD CAUSE IT AND ALL, BUT THERE WAS A
EVEN BROUGHT ANYTHING UP -- IF IT WAS, HE NEVER BROUGHT ANYTHING UP IN RELATION TO IT.
Q. HAD YOU GIVEN THAT STATEMENT AT THE TIME YOU MET WITH GEROD AND JOHN?
A. HAD I GIVEN THIS? (INDICATING)
Q. YES.
A. I BELIEVE SO.
Q. AND IN THAT MEETING DID YOU TELL HIM THAT MR . WELLS WAS INVOLVED IN THE INVESTIGATION, THE COMPLAINT THAT LED TO THE INVESTIGATION?
A. SAY THAT AGAIN?
Q. DID YOU MENTION CHAD'S NAME AS BEING INVOLVED IN THE INVESTIGATION?
A. I DON'T KNOW IF I DID OR NOT. I MEAN THEY WERE WANTING TO KNOW WHO WAS INVOLVED. THEY HAD IDEAS ALREADY ON WHO WAS INVOLVED, BUT I DON' T KNOW IF I -- I SPECIFICALLY TOLD HIM I WAS INVOLVED FOR SURE.

Q. DID YOU MENTION CHAD WELLS' NAME AT ALL DURING THAT MEETING?
A. TO TELL YOU THE TRUTH, I CAN'T REMEMBER. HE DID.
(INDICATING) THEY HAD AN IDEA IT WAS ME, CHAD AND JERRY SAMPRACT, IS WHAT THEY TOLD ME.
Q. WHAT DID THEY TELL YOU ABOUT CHAD'S PARTICIPATION?
A. THEY DIDN'T KNOW. THEY DIDN'T KNOW ANYTHING ABOUT HIS PARTICIPATION, THEY JUST THOUGHT HE MIGHT HAVE BEEN BEHIND IT.
Q. ALL RIGHT. AND YOU SAID MR. ALWELL WAS PRETTY UPSET ABOUT THE INVESTIGATION?
A. YEAH, I WOULD SAY SO. PRETTY UPSET WITH ME.
Q. WELL I UNDERSTAND THAT, BUT YOU MADE THE STATEMENT THAT HE WAS UPSET, AND I WANT TO KNOW WHAT MADE YOU SAY THAT?
A. HIS REACTION, YOU KNOW, HE WAS MAD, FROM WHAT I WAS LOOKING AT, HE WAS MAD.
Q. WHAT DID HE DO OR SAY TO INDICAT TO YOU THAT HE WAS MAD?
A. MAINLY IT WAS, "DO YOU KNOW I COULD HAVE GOT FIRED OVER THAT," AND MAINLY JUST HIS REACTION.
Q. WHAT ABOUT MR. HAMERNICK? DID HE HAVE ANY REACTION?
A. HE WAS JUST KIND OF LIKE FLABBERGASTED THAT I WOULD EVEN DO IT.

Q. DO YOU RECALL AN INCIDENT INVOLVING A LUNCH ORDER ABOUT SOME WORKERS REFUSING TO PICK UP A LUNCH ORDER FOR GEROD?
A. YES.
Q. TELL ME ABOUT THAT, SIR?
A. SUPPOSEDLY HE ORDERED A BAKED POTATO, I THINK, AND IT DIDN'T GET PICKED UP. THEY DIDN'T BRING IT BACK.
Q. DO YOU HAVE ANY PERSONAL KNOWLEDGE OF THAT INCIDENT, OR JUST WHAT PEOPLE HAVE TOLD YOU?
A. THINK I IT WAS JUST WHAT PEOPLE TOLD ME. I WASN'T THERE.
Q. DID IT HAPPEN ON YOUR SHIFT?
A. I DON'T THINK SO, NO. I WASN'T THERE.
Q. DO YOU KNOW IF THIS WAS BEFORE OR AFTER CHAD'S OPERATION ON
KIND OF ASKED ME WHO WAS INVOLVED. I SAID, "WELL, I AM NOT GOING TO TELL YOU." THEY KIND OF SAID, "WE KIND OF HAVE AN IDEA WHO IT IS."
Q. AND THEY TOLD YOU CHAD AND JERRY SAMPRACT?
A. YES. THEY HAD NOT A CLUE THAT I WAS INVOLVED IN IT.
MR. BROUSSARD: LET'S GO OFF THE RECORD A SECOND. I AM GOING TO REVIEW MY NOTES, AND I THINK I WILL BE THROUGH IN A SECOND.
(DISCUSSION OFF THE RECORD)
MR. BROUSSARD: I DON'T HAVE ANY OTHER QUESTIONS.
BY MR. AUZENNE:

Q. MR. WHITE, JUST ONE FOLLOW-UP. DO YOU KNOW THE REASON WHY MR. WELLS LEFT EMPLOYMENT WITH THE CITY?
A. NO, NOT REALLY. I MEAN I KNOW HE GOT ANOTHER JOB IN ALABAMA, BUT I DON'T KNOW IF HE WAS SEEKING ONE BEFOREHAND OR WHAT. I DON'T KNOW. I MEAN I KNEW HE WASN'T HAPPY WHERE HE WAS AT, AT THE PLANT.
Q. DID HE TELL YOU WHY??
A. MAINLY JUST THE FRICTION ON BETWEEN HIM AND JOHN.
Q. DID HE TALK ABOUT ANY FRICTION BETWEEN ANYONE ELSE WITH THE CITY, WHETHER IT BE A SUPERVISOR OR ANYBODY WITH THE CITY OF ALEXANDRIA?
A. NOT THAT I KNOW OF.
Q. DID HE DETAIL WHAT THE FRICTION BETWEEN HE AND JOHN
HAMERNICK WAS? DID HE EVER TELL YOU ABOUT IT?
A. OTHER THAN HAVING TO DO WITH THINGS WITH HIS KNEE --
Q. TALKING ABOUT THE PHYSICAL THERAPY TRIP?
A. YES, THAT AND STRIPPING AND WAXING THE FLOORS OR WHATEVER, WHOEVER TOLD HIM. BUT JUST -- I AM TRYING TO THINK OF OTHER INCIDENCES. I KNOW HE -- MAYBE JUST THE WAY THEY ACT, I GUESS. I DON'T KNOW. TO REMEMBER NOW EXACTLY WHAT HE SAID, I HAVE NOT A CLUE.
Q. WHO IS "THEY", TO BE CLEAR? A. JOHN AND GEROD.

Q. ANY DETAILS AS TO WHAT YOU MEAN BY THAT, "HOW THEY ACTED"?
A. NO, NO DETAILS.
Q. MR. WHITE, I M CURIOUS. WHEN YOU REPORTED THE TAKING OF THE MATERIAL TO THE STATE POLICE, DID YOU EVER TALK TO ANYBODY, SONNY CRAIG, PAM SAURAGE OR ANYBODY WITH THE CITY OF ALEXANDRIA ABOUT THIS?
A. NO.
MR. AUZENNE: ONE OTHER THING. I WOULD LIKE TO ATTACH THE STATEMENT MR. WHITE REFERRED TO IN SOME OF HIS ANSWERS TO THE DEPOSITION. I DON'T KNOW WHAT NUMBER WE ARE AT . THAT IS THE ONLY THING. THAT WOULD BE KEITH WHITE NUMBER 5 .
MR. CALVIT: NOTHING FURTHER.
MR. D'ALBOR: : I DON'T HAVE ANYTHING.
MR . AUZENNE: :WOULD YOU LIKE TO READ AND SIGN
YOUR DEPOSITION OR WAIVE THAT RIGHT? IT I S ENTIRELY UP TO YOU .
DEPOSITION OF DAVID REED
Q. WELL , DID IT INVOLVE ROOFING M. MATERIAL?
YES, SIR, IT DID.
Q. WAS MR. ALLWELL AND MR. HAMERNICK INVOLVED OR - OR ACCUSED IN THAT MATTER AS FAR AS - IN THAT INVESTIGATION AS FAR AS YOU KNOW?
A. YES, SIR.
Q. DO YOU KNOW IF THEY GOT ANY OF THE ROOFING MATERIAL?
A. DON'T KNOW FOR SURE.

Q. OKAY. DID YOU GET ANY OF THE ROOFING MATERIAL? NO, SIR.
Q. DID MR. ALWELL EVER TALK TO YOU ABOUT THAT
INVESTIGATION?
A. HE HAD ASKED ME IF - IF I HAD SEEN SOME PICTURES THAT WERE CIRCULATING AROUND OF HIM LOADING SOME OF THE MATERIAL UP, WHICH I DID. I DID SEE THE PICTURES.
Q. WHO HAD SHOWED YOU THE PICTURES?
A. IT SEEMED - IF I REMEMBER RIGHT, I THINK IT WAS JERRY SAMPRACT.
Q. DID YOU TELL MR. ALWELL THAT?
A. I TOLD HIM THAT I HAD SEEN THE PICTURES. I DIDN'T TELL HIM WHO SHOWED THEM TO ME OR WHAT, BUT I DID TELL HIM I DID SEE THE PICTURES.
Q. DID MR. HAMERNICK ASK YOU ANYTHING ABOUT THE INVESTIGATION?
A. NOT THAT I REMEMBER. NO, SIR, I -- I DON'T THINK HE
A THAT WAS DOWN IN THE ELECTRICIAN'S SHOP.
Q WHO ALL WAS PRESENT WHEN YOU - WHEN YOU--
A IT WAS ME AND MR. ALWELL.
Q. AND HOW DID IT COME UP? DO YOU RECALL HOW IT CAME UP?
A OH, HE COME DOWN TO CHAT WITH ME THAT MORNING AND HE WAS CURIOUS ABOUT WHETHER I HAD SEEN THOSE PICTURES OR NOT. AND LIKE I SAID, I - I TOLD HIM, YES SIR, I - I DID SEE THEM.
Q AND THEN WHAT ELSE DID HE SAY?

A. WELL, HE - HE WAS CURIOUS AS TO - I GUESS AS TO WHO HAD GOT THE PICTURES OR TAKEN THE PICTURES OR WHAT. AND I TOLD HIM I DON'T - YOU KNOW, I DIDN'T KNOW WHO TOOK THEM OR WHAT, BUT I KNOW WHO HAD THEM BUT I DIDN'T TELL HIM, YOU KNOW, BUT HE - HE WASN'T - HE DIDN'T JUST COME OUT AND ASK ME, YOU KNOW, WHO TOOK THE PICTURES OR WHAT. YOU KNOW, SO I REALLY - LIKE I SAID I REALLY DIDN'T WANT TO GET INVOLVED IN THAT BUT, I MEAN, HE WAS ASKING SO I TOLD HIM, YES, SIR, I HAVE SEEN THEM.

Q AND DID HE SAY ANYTHING ABOUT THE - WHAT DID HE SAY ABOUT THE - YOU SAID HE INDICATED SOME LANGUAGE ABOUT SOME KIND OF RETALIATION OR SOMETHING?

A THAT WAS LATER ON. THAT WAS UP IN THE - IN THE CONTROL ROOM, THE BEST I REMEMBER. IT WAS - YOU KNOW, IT WAS KIND OF LIKE NOT - I MEAN, DON'T QUOTE ME WORD FOR WORD, BUT IT WAS YOU KNOW, IF Y'ALL WANT, TO PLAY WE WILL PLAY. YOU KNOW, IT WAS THAT TYPE OF --

Q AND MR. ALWELL SAID THAT?

A YES, SIR,I''M PRETTY' SURE IT WAS.

Q AND HE WAS REFERRING TO - THE INVESTIGATION?

A THAT IS THE WAY I TOOK IT.

Q WHO WAS PRESENT WHEN - WHEN HE SAID THAT?

A LET'S SEE, I'M TRYING TO REMEMBER. THAT WAS - LIKE I SAID THAT HAS BEEN AWHILE BACK. IT SEEMED LIKE - I KNOW THERE WAS ONE OPERATOR IN THERE; THAT

WAS LANIS DAY. I THINK HE WAS IN THE - IN THE ROOM. IT MAY HAVE BEEN KEITH WHITE, THE SHIFT SUPERVISOR. I - I - I DON'T REMEMBER.

Q OKAY. AND YOU WERE IN THE CONTROL ROOM?

A YES, SIR.

Q ANY OTHER TIMES YOU HEARD MR. ALWELL SAY ANYTHING IN RELATION TO EITHER THE INVESTIGATION OR THE PEOPLE YOU THOUGHT WAS INVOLVED IN THE INVESTIGATION?

A NO, SIR, NONE OTHER THAN - THAN WHEN HE WAS DOWN IN THE ELECTRICIAN'S SHOP OR WHEN I HEARD HIM UP IN THE CONTROL ROOM. I - I CAN'T THINK OF ANY OTHER TIME THAT REMEMBER HIM, YOU KNOW, OUT - YOU KNOW, JUST OUT SAYING ANYTHING ABOUT IT.

Q WHAT ABOUT JOHN, DID JOHN EVER SAY ANYTHING ABOUT IT?

A NOT - NOT TO MY KNOWLEDGE

Q DO YOU KNOW ANYTHING ABOUT CHAD WELLS STRIPPING AND
OFFICE OR DO YOU RECALL?

A IT WAS - IT WAS IN GERARD'S OFFICE, BUT GERARD WASN'T PRESENT.

Q AND WHAT HAPPENED AT THAT MEETING? IT WAS THE THREE OF Y'ALL ALL THERE OR FOUR OF Y'ALL?

A I THINK IT WAS - LET'S SEE., IT WAS MYSELF, MR. HAMERNICK, MR. TYLER AND MR. WELLS.

Q OKAY. AND TELL ME WHAT YOU RECALL HAPPENING IN THAT MEETING.

A I RECALL MR. HAMERNICK TELLING MR. WELLS THAT HE WAS INSTRUCTED TO STRIP AND WAX THE FLOOR. AND MR. WELLS WAS - YOU KNOW. HE - HE EXPRESSED HIS CONCERN ABOUT REALLY NOT WANTING TO BECAUSE HE WAS AFRAID OF SLIPPING AND INJURING HIS KNEE, YOU KNOW, WHICH WAS STILL, LIKE I SAID, IN A - IN A STATE WHERE HE WAS UNDER THE DOCTOR'S CARE. AND I REMEMBER MR. HAMERNICK SAYING IF YOU DON'T STRIP AND WAX THE FLOOR I HAVE BEEN INSTRUCTED TO LET YOU GO.

Q OKAY. DID HE TELL HIM TO GO HOME - DO IT OR GO HOME OR DID HE SAY I'M INSTRUCTED TO LET YOU GO?

A THAT WAS.THE WORDS THAT I REMEMBER.

Q WHAT?

A I WAS - I WAS - I HAVE BEEN INSTRUCTED TO LET YOU GO.

Q WHAT DID MR. WELLS SAY AFTER THAT?

A MR. WELLS THEN - I - THE BEST THAT I REMEMBER IT WAS HE WAS GOING TO CALL AND TALK TO HIS - I THINK HIS DOCTOR A TROUBLEMAKER AND HAD A BAD ATTITUDE.

Q AND YOU KNOW THAT CHAD CROSSED THEM BY TELLING PEOPLE AND MAKING IT KNOWN THAT HE DIDN'T CONSIDER THAT TO BE PART OF HIS JOE, THE CHORES HE WAS BEING ASKED TO DO; TRUE?

A A CERTAIN PART OF THAT TS TRUE, YEAH, BUT I THINK LATER ON HIS - THE

MORE - THE MOST CONCERN WAS WITH HIS WELL BEING, OF HIS KNEE.

Q WHY DIDN'T CHAD JUST TAKE A SICK DAY IF HE COULDN'T DO THE WORK?

MR.. BROUSSARD:

OBJECTION. IT CALLS FOR SPECULATION UNLESS HE KNOWS.

MR CALVIT:

SURE, HE HAS TALKED ABOUT WHY CHAD DID THINGS ALL - ALL THE TIME.

MR. BROUSSARD:

UH-HUH. (YES)

BY MR. CALVIT

Q WHY DIDN'T CHAD JUST GO HOME?

A THAT IS NOT FOR ME TO SAY. I DON'T KNOW, I'M NOT CHAD WELLS.

Q HAVE YOU EVER BEEN SICK AT WORK?

A SURE.

Q DID YOU GO HOME?

A YEAH.

DEPOSITION OF LARRY MCGUIRT

TO SONNY CRAIG OR PAM SAURAGE ABOUT GETTING TIME OFF TO GO TO PHYSICAL THERAPY?

A NO.

Q DO YOU KNOW ANYTHING ABOUT MR. WELLS STRIPPING AND WAXING THE TURBINE FLOORS?

A YES.

Q WHAT DO YOU KNOW ABOUT THAT?

A THE EVENING SHIFT COMING ON, DARREN SIGUR, HE WAS GIVEN INSTRUCTIONS TO HAVE CHAD TO STRIP THE FLOOR WHEN HE COME ON SHIFT.

Q OKAY. NOW, I DON'T QUITE UNDERSTAND. YOU SAID THE EVENING SHIFT?

A YES, HE WAS WORKING THE EVENING SHIFT.

Q ALL RIGHT.

A. HE WAS FIXING TO COME ON AND DARREN SIGUR WAS THE SHIFT SUPERVISOR. AND HE HAD COME ON AND HE WAS BEING - GIVEN INSTRUCTIONS TO HAVE CHAD TO STRIP THE FLOOR WHEN HE CAME IN.

Q WHO WAS GIVING HIM THOSE INSTRUCTIONS?

A JOHN HAMERNICK.

Q WELL, WAS THERE ANY DISCUSSION? DO YOU RECALL ANY DISCUSSIONS AROUND JOHN GIVING HIM THAT ORDER?

A DARREN SAID HE WOULD TAKE CARE OF IT, HIS CREW, AND THEY SAID, NO, THEY WANTED CHAD TO DO THAT.

Q JOHN SAID THAT?

OUT STRIPPING AND WAXING THE FLOOR, THAT IS WHEN I WORKED THAT NIGHT. HE WAS STILL WAXING AT SEVEN O'CLOCK OR SO WHEN I GOT THERE. HE WAS CLEANING UP.

Q OKAY. WE ARE TALKING ABOUT THE TURBINE FLOOR?

A YES, SIR.

Q AROUND TURBINE NUMBER FOUR?

A YES, SIR.

Q OKAY. YOU WERE COMING INTO WORK ON WHOSE SHIFT?

A KEITH WHITE, T WAS WORKING WITH KEITH THEN. I WAS WORKING NIGHTS.

Q AND DO YOU KNOW WHOSE SHIFT CHAD HAD BEEN WORKING ON?
A HE WAS WITH BARRY TYLER AND, T THINK, LLOYD FUQUA, T BELIEVE.
Q AND YOU WERE AN OPERATOR ONE AT THAT TIME?
A YES, SIR.
Q WAS THE PLANT RUNNING AT THAT TIME?
A YES, SIR.
Q OKAY. TELL ME WHAT HAPPENED WHEN YOU CAME IN AND YOU SAW THAT HE WAS STRIPPING AND WAXING THE FLOOR.
A I JUST CAME IN AND HE WAS OUT. AND I ASKED THEM WHERE HE WAS AND THEY SAID HE WAS OUT WAXING THE FLOOR. SO I WALKED ABOUT THERE AND HE SHOWED ME HIS KNEE. HIS KNEE WAS SWOLLEN UP. I ASKED HIM WHAT HE HAD BEEN DOING AND HE SAID HE WAS WAXING THE FLOOR, AND THAT WAS ABOUT THE EXTENT OF "IT REALLY.
Q DID HE LEAVE THEN? E MEAN,--
A YES, SIR. HE - HE CLEANED UP, YOU KNOW, PICKED HIS STUFF UP AND LEFT, WENT HOME.
Q OKAY, DID HE TELL YOU WHO TOLD HIM TO STRIP AND WAX THE FLOOR?
A HE SAID BARRY TYLER DID.
Q DID MAINTENANCE EVER STRIP AND WAX THE FLOOR?
A WELL, I THINK THEY HAD STARTED DOING IT. THEY HAD STARTED HELPING HIM, WHAT I WAS TOLD. YOU KNOW, I DON'T KNOW.

Q IS THAT A JOB THAT AN OPERATOR ONE WOULD DO, STRIP AND WAX THE FLOOR WHILE THE PLANT WAS RUNNING?
A WELL, I GUESS IF YOU ARE TOLD TO DO IT, IT IS, BUT IT SHOULDN'T BE.
Q AND WHY IS THAT?
A WELL, YOU SHOULDN'T BE STRIPPING AND WAXING THE FLOOR WHEN THE PLANT IS RUNNING
Q I SAID WHY NOT?
A I MEAN, YOU'VE GOT MILLIONS OF DOLLARS OF EQUIPMENT DOWN THERE. WHAT WOULD HAPPEN IF SOMETHING WAS TO TEAR UP, YOU KNOW, LOSE OIL? JUST ANYTHING, YOU KNOW, COULD HAPPEN. I MEAN, THAT IS NOT - NOT SAFE OR IT JUST AIN'T RIGHT.
Q AS I UNDERSTAND IT, AND CORRECT ME IF I'M WRONG, THE OPERATOR ONE ACTS AS THE OILER WHILE THE PLANT IS RUNNING. IS THAT CORRECT?
A YES, SIR.
Q AND WHAT DOES THE OILER DO? WHAT IS - WHAT IS HIS DUTIES?
A HE MAKES HIS ROUNDS, CHECKS THROUGHOUT THE PLANT FOR JUST ANY PROBLEMS. TEMPERATURES , CHECKS TEMPERATURES, READINGS, CHECKS THE COOLING - JUST MORE OR LESS ROAMS AROUND AND LOOKS OVER EVERYTHING. YOU'VE GOT TO CUT A PUMP ON OR OPEN OR SHUT A VALVE, JUST ANYTHING YOU MIGHT HAVE TO DO WHILE YOU ARE THERE.
Q WHAT ABOUT THE OPERATOR TWO, WHAT IS THE OPERATOR TWO DOING?

A HE OPERATES THE BOILER, FIRES THE BOILER.
Q AND THAT IS AT THE CONTROL, IN THE CONTROL ROOM?
A YES, SIR.
Q AND WHAT ABOUT THE SHIFT SUPERVISOR?
A WELL, HE STAYS IN THE CONTROL ROOM MOST OF THE TIME TO HELP OUT IF ANYBODY NEEDS HELP, ANSWERS THE PHONE WHEN CLECO CALLS. AND HE PERIODICALLY MAKES HIS ROUNDS TOO THROUGHOUT THE PLANT IF - IF I NEED HELP OR - YOU KNOW, I USUALLY GO GET HIM. THE OPERATOR TWO NORMALLY STAYS IN THE CONTROL ROOM.
Q DID YOU EVER HEAR JOHN HAMERNICK THREATEN CHAD, CHAD WELLS?
A. WHAT DO YOU MEAN?
Q DID YOU EVER HEAR HIM TELL HIM THAT - WELL, DID YOU
EVER HEAR HIM ORDER HIM TO STRIP AND WAX THE FLOOR? A NOT ME.
Q DID YOU EVER HEAR HIM TELL HIM THAT - FOR HIM TO CLEAN THE HOT WELL OUT?
A NO, SIR, I WASN'T THERE.
Q OR TO CHECK FOR AIR LEAKS TN THE CONDENSER?
A (INDICATING A NEGATIVE ESPONSE)
MR. CALVI T:
YOU NEED TO SAY YES OR NO. THE COURT REPORTER:
YOUR ANSWER, SIR?
A NO, SIR.

Q YOU HAVE TO VERBALIZE YOUR ANSWERS.
A OKAY. I WASN'T - I WASN'T THERE WHEN ALL THAT WAS TAKING PLACE.
Q OKAY. DID YOU EVER HEAR JOHN MAKE THE STATEMENT TO CHAD, AND LANIS DAY AND YOURSELF THAT IT WAS GOING TO BE BAD ON OPERATORS ABOUT THAT INVESTIGATION, IF THEY FOUND OUT WHO - WHO DID THE INVESTIGATION?
A YES, SIR.
Q TELL ME ABOUT THAT WHERE - WHERE DID THAT OCCUR?
A WELL, LET ME THINK BACK WHEN. LANIS WAS OUT BACK AT THE WATER PLANT AND GERARD COME AROUND THERE AND ASKED HIM ABOUT THE INVESTIGATION. HE SAID HE DIDN'T KNOW.
MR. CALVIT:
WHY DON'T YOU SAY WHO HE IS?
ALANIS DAY. AND HE COME IN, LANIS DAY COME IN THE CONTROL ROOM, AND ME AND CHAD AND LANIS DAY WAS STANDING THERE AND JOHN WALKED IN AND ASKED LANIS ABOUT IT AND LANIS SAID HE DIDN'T KNOW.
Q HE ASKED LANIS WHAT
A ABOUT THE INVESTIGATION OR THE PICTURES. Q OKAY.
A AND HE SAID HE DIDN'T KNOW AND IT YANG/YANG BACK AND FORTH THERE FOR A FEW MINUTES. AND THEN WHEN JOHN GOT READY TO LEAVE HE SAID IT WAS GOING TO BE A TRICKLE DOWN EFFECT, I THINK IS WHAT WAS SAID, BUT THAT IS - YOU KNOW,

EXACTLY WORD, I DON'T KNOW, BUT IT WAS A TRICKLE DOWN EFFECT ON THE OPERATORS.
Q AND WHAT IS YOUR UNDERSTANDING OF WHAT THAT MEANT, TRICKLE DOWN EFFECT ON THE OPERATORS?
A WELL I WOULD KIND OF TAKE IS AS YOU KNOW, I AIN'T GOING TO SAY HE MEANT HE WAS GETTING EVEN BUT, I MEAN, THAT IS KIND OF WHAT IT SOUNDED LIKD TO ME.
Q OKAY. WHEN DID THIS CONVERSATION TAKE PLACE IN RELATION TO CHAD'S SURGERY? DO YOU RECALL?
A I WOULD SAY IT WAS AFTERWARDS.
Q OKAY. AND LANIS, AND YOU AND CHAD WERE ALL WORKING ON THE SAME SHIFT?
A AT THAT TIME I WAS. I WAS FILLING IN ON THAT SHIFT
Q SO IT WAS KIND OF A NICE THING, ALMOST AGAINST THE RULES THAT THEY WERE LETTING Y'ALL DDO TO LEAVE THE PLANT, TRUE?
A TRUE.
Q AND WHEN THEY TOOK AWAY THE PRIVILEGE THAT EVIDENTLY HAD BEEN ALLOWED, THEY DIDN'T BREAK ANY RULES AS FAR AS YOUR EMPLOYMENT BY DOING THAT, DID THEY?
A NO.
Q IN FACT, THEY MADE YOU ADHERE TO THE RULES?
A YES, SIR.
Q DID CHAD EVER TELL YOU WHY HE WAS MOVING TO ALABAMA?
A NOT THAT I'M AWARE OF. I MEAN, --

Q WHAT WAS YOUR UNDERSTANDING OF THE REASON FOR THE MOVE?
A I WOULD SAY TO GET AWAY FROM HERE.
Q AND WHAT ABOUT HERE WAS HE GETTING AWAY FROM?
A WORK.
Q DID HF EVER TELL YOU - DID CHAD EVER TELL YOU HE DIDN'T LIKE TO WORK?
A WELL, THEY DIDN'T GET ALONG. I MEAN, YOU KNOW, NOBODY IS GOING TO GET ALONG.
Q DID CHAD EVER TELL YOU THAT - THAT HE THOUGHT HE OUGHT TO HAVE A SUPERVISOR'S JOB OUT THERE?
A HE DIDN'T TELL ME THAT.
Q WAS CHAD THERE WHEN JEREMY WOOD WAS PROMOTED TO
A THEY JUST - LIKE I SAID, THEY DIDN'T GET' ALONG.
Q DO YOU KNOW ANYTHING ABOUT CHAD S WORK OVER IN ALABAMA?
A I KNOW HE WENT TO ALABAMA, OTHER THAN THAT --
Q YOU KNOW HOW MANY JOBS HE HAS HAD OVER THERE
A NO, SIR.
Q DO YOU KNOW WHAT CHAD IS DOING RIGHT LNOW?
A NO, SIR.
MR. CALVIT:
NO OTHER QUESTIONS. THANK YOU.
MR D'ALBOR:
I DON'T HAVE ANY QUESTIONS.
MR. AUZENNE:

I DON'T HAVE ANY. THANK YOU, MR. MCFARLAND.
MR. BROUSSARD:
THANK YOU, MR. MC FARLAND .
THE WITNESS:
THANK YOU.
MR. AUZENNE
I APPRECIATE IT.
(DEPOSITION CONCLUDED)
ALEXANDRIA CIVIL SERVICE COMMISSION
November 25, 1997
MEMO To: ALL DIVISION AND DEPARTMENT HEADS
FROM: PAM SAURAGE
DIRECTOR of PERSONNEL
RE: LIGHT DUTY ASSIGNMENTS FOR EMPLOYEES
This letter is to reiteate the fact that the City of Alexandria does not offer light duty assignments to any employees. An employee must be able to perform ninety percent (90%) of the duties outlined in his/her job description without limitations before returning to work.
Before an employee that has been released from duty for medical reasons is allowed to return to work, his/her administering doctor must review his/her job description and provide written confirmation that he/she is able to perform the duties in his/her job description.
If someone in your department is working with limitations, you must notify this office immediately.
THERE ARE NO EXCEPTIONS To THIS POLICY.
Should you have any questions regarding this matter, please do not hesitate to contact me,
Thank you.

cc: Mayor Ned Randolph
Harold Chambers
Charlie Nunnally, III

Approved By:
Edward G. Randolph, Mayor
Charles F. Nunnally, III,
City Attorney

(2)

No. 04-249

IN THE

Supreme Court of the United States

CHADWICK E. WELLS, PETITIONER

v.

CITY OF ALEXANDRIA; JOHN HAMERNICK; WILLIAM GERARD ALWELL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

I. The Court of Appeals correctly affirmed the District Court's grant of summary judgment in favor of the **CITY OF ALEXANDRIA, WILLIAM GERARD ALWELL,** and **JOHN HAMERNICK** when no evidence existed to support **WELLS'** claim regarding an alleged Louisiana state intentional tort claim.

II. The Court of Appeals correctly noted that the record references submitted in support of the **CITY, ALWELL,** and **HAMERNICK'S** motion for summary judgment contained the medical records of **WELLS'** treating physician Dr. Pope, and as such, no new evidence was submitted at oral argument which prejudiced **WELLS.**

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CASES

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SUMMARY OF ARGUMENT

WELLS' claims of constructive discharge cannot be sustained when he voluntarily left employment with the **CITY**, and sought employment in Alabama one (1) year prior to his knee surgery. **WELLS** was never restricted from performing maintenance work at the **CITY** power plant until he complained to his treating physician that he did not want to do the work in August 2000. **HAMERNICK** and **ALWELL's** collective knowledge of **WELLS** jumping from boats, running down stairs, and performing his job duties without restriction after his February 2000 knee surgery, led them to believe that he could perform his job. **WELLS** first complained that he could not strip and wax the turbine floor after he had been assigned this duty, along with the other plant operators in August 2000. Because **WELLS** never complained or showed any sign of disability, and had a full duty work release from his treating physician in March 2000, neither **HAMERNICK** or **ALWELL** had any reason to believe that he could not perform his job.

No intentional tort occurred when **HAMERNICK** and **ALWELL** required **WELLS** to do his job. Neither **HAMERNICK** or **ALWELL** expressed any "conscious desire" to injure **WELLS**, through direct or circumstantial evidence. Despite seventeen (17) depositions being taken of current and former employees and co-workers of **WELLS**, none of them expressed any firsthand knowledge of ill will directed from **HAMERNICK** and **ALWELL** towards **WELLS**. The evidence that **WELLS** was released to perform all of his job duties by his treating physician was properly considered by the district judge when he granted the defendants' motion for summary judgment. As such, the court of appeal properly upheld the district judge's decision, and **WELLS'** claims should be dismissed, and his application for writ not considered.

STATEMENT

On August 16, 2001, plaintiff-appellant Chadwick E. Wells (hereinafter "**WELLS**"), a former Operator II employee at the City of Alexandria (hereinafter "**CITY**") Electrical Power Plant, filed a Petition for Damages in the Ninth Judicial District Court, Parish of Rapides, State of Louisiana, alleging claims under the Americans with Disabilities Act (hereinafter "ADA"), the Civil Rights Act, Louisiana State intentional tort law and a violation of the State whistleblower act. **WELLS** also demanded attorneys fees. Since **WELLS'** "Petition for Damages" revealed diversity of citizenship, and made federal claims, it was timely removed to the United States District Court for the Western District of Louisiana-Alexandria Division.

WELLS' Petition alleged that William Gerard Alwell (hereinafter "**ALWELL**") Plant Superintendent at the City Power Plant, and John Hamernick (hereinafter "**HAMERNICK**") Plant Chief Operator, engaged in acts that created a hostile work environment. **WELLS** alleged that workplace harassment occurred when he returned to work after undergoing knee surgery, in retaliation for Wells' reporting **ALWELL's** alleged unlawful conduct of stealing **CITY** roofing material to the Louisiana State Police. **WELLS** claimed that the harassment caused him to miss a physical therapy appointment. **WELLS** further alleged that he suffered pain from being forced to perform physically demanding work assignments, such as stripping and waxing floors, cleaning the "~~hot~~ well" area of the plant, and checking for air leaks in the condenser units. **WELLS** alleged that **HAMERNICK** and **ALWELL's** acts caused him to re-injure his knee, and experience additional pain and suffering.

The **CITY**, **HAMERNICK** and **ALWELL**, filed Motions for Summary Judgment, contending that **WELLS'** claims had no merit. Attached to defendants' Motions were

the depositions of **WELLS**; **ALWELL**; **HAMERNICK**; Kenneth Michael Ellison, **WELLS'** City of Tuscaloosa, Alabama, Supervisor; Pamela Saurage, City Personnel Director ("Saurage"); and A.E. "Sonny" Craig, City Director of Utilities ("Craig"). Additionally, excerpts from both **WELLS'** City Personnel File and his City of Tuscaloosa Personnel File were included with the defendants' Motions for Summary Judgment. Finally, the **CITY** attached the depositions of **WELLS'** co-workers David A. Reed, Larry McGuirt, Keith White and Floyd McFarland to its Reply Brief filed in response to **WELLS'** opposition to the defendants' Motions for Summary Judgment. These additional depositions were also adopted by **ALWELL** in reply to **WELLS'** argument.

On July 15, 2003, United States District Judge F.A. Little, Jr. granted defendants' Motions for Summary Judgment, dismissing all of **WELLS'** claims. Judge Little, in his Reasons for Judgment, held that **WELLS** had abandoned his ADA claim and any alleged state law disability claims. Judge Little dismissed **WELLS'** retaliation claims since he did not follow state law requirements for reporting the alleged violation. Judge Little also dismissed **WELLS'** intentional tort claims made under Louisiana law, finding that the intentional tort exception to the Louisiana Workers' Compensation Act did not apply. Judge Little further denied **WELLS'** claims for constructive discharge, because the complained of incidents occurred over a six (6) month time period, and were not so intolerable that a reasonable employee would feel compelled to resign.

Finally, Judge Little held that because **HAMERNICK** and **ALWELL** did not commit any tortious act, that the **CITY** was not vicariously liable for their actions.

WELLS filed a Notice of Appeal of Judge Little's ruling on July 30, 2003. After oral argument was granted and

heard on April 6, 2004, by the United States Court of Appeal for the Fifth Circuit, a decision affirming the District Court's grant of summary judgment was rendered on April 19, 2004. **WELLS'** petition for rehearing was denied on May 24, 2004. **WELLS** now seeks a writ of certiorari from this Court pursuant to 28 U.S.C. Section 1254(1).

CLARIFICATION OF THE RECORD

The record evidence considered by the district court clearly showed that no intentional conduct could reasonably be attributed to **ALWELL, HAMERNICK** or the **CITY**.

DAVID A. REED

David Reed, friend and co-worker of **WELLS**, testified that approximately one year prior to **WELLS'** surgery in February of 2000, he sought employment in Alabama, where his wife's family lived. Reed further testified that after **WELLS'** surgery, but prior to the alleged intentional acts performed by **HAMERNICK** and **ALWELL, WELLS** continued seeking employment in Alabama. Reed further testified that he personally knew that City Plant Operators, including **WELLS,** expressed opinions to **HAMERNICK** and **ALWELL** that they should not be forced to perform maintenance type work at the Power Plant. Reed further testified that **WELLS** never told him that his knee was injured before the surgery, or told supervisors that his injured knee prevented him from performing maintenance work at the Plant in Reed's presence.

Reed further testified that when he got sick at work he was allowed to go home and was not fired by **HAMERNICK** and **ALWELL.** Reed testified that he had personally seen other Plant Operators, including Jerome Woods and Lloyd

Fuqua, strip and wax the turbine floors at the Plant. Reed testified that the turbine floor needed to be stripped and waxed on a periodic basis, and when the Plant janitor, Charles Smith worked for the **CITY**, he would perform these tasks. Reed further testified that when Janitor Smith retired, the janitor position at the City Power Plant was not filled, and Plant Operators helped perform maintenance work.

KEITH WHITE

Keith White, Shift Supervisor of City Plant Operators, admitted in deposition that he reported **ALWELL** to the Louisiana State Police for the alleged theft of roofing material, and that the investigation proved that the charges were unfounded. White further testified that there was nothing wrong with Operators performing maintenance at the City Power Plant, and in fact all the Operators had performed it at some point or another. White also testified that he told **ALWELL** that he had been the person who reported the alleged thefts to the Louisiana State Police and that he suffered no retaliation from anyone thereafter.

LARRY MCGUIRT

Larry McGuirt, Instrument Technician at the City Power Plant, testified that he did not know anything about **WELLS** getting off work to go to physical therapy. McGuirt also knew nothing about **WELLS** being required to work in the hot wells. McGuirt testified that he knew nothing about **WELLS'** inspecting or cleaning the condenser units. McGuirt further testified that he never heard **HAMERNICK** and **ALWELL** make derogatory comments about **WELLS** in his presence or in anyone elses presence at the Plant. McGuirt further testified that **WELLS** never showed him a swollen leg.

FLOYD MCFARLAND

Floyd McFarland, **CITY** Power Plant Operator and friend of **WELLS**, testified that he deer hunted with **WELLS** in a "box stand" two or three times after his surgery, that **WELLS** killed a deer on one of those hunts, and suffered no perceived ill effects. McFarland stated that he never heard **ALWELL** or **HAMERNICK** make derogatory comments about **WELLS.** McFarland testified that as an Operator I, he waxed the turbine floor, although he had never stripped it. McFarland testified that maintenance personnel cleaned the hot well, but that the Operators were asked to help them at times. McFarland testified that when **WELLS** killed the deer, McFarland loaded it onto his four-wheeler rack and cleaned the deer, because Wells was too lazy to clean it.

McFarland testified that he painted at the Power Plant using a brush and rollers, and that no one was trying to punish him when he drew that duty. McFarland testified that when an operator drew hot well cleaning and condenser check duty, it was purely luck of the draw. McFarland testified that rules at the City Power Plant did not allow an Operator to leave the Plant at lunch time, and when the supervisors allowed Operators to leave for lunch, that that was a "nice thing".

WELLS' MISSTATEMENTS OF FACT

While petitioner makes much of the one occasion where he was not allowed to leave the Plant and attend physical therapy, he does not mention the numerous occasions where **HAMERNICK** and **ALWELL** accommodated his requests to attend physical therapy, and did not deduct sick or annual leave time from **WELLS** when he attended those appointments. **WELLS** fails to inform the Court that on the only day that he was denied a request to attend physical therapy on 15 minutes notice, that no Plant

Operator was present or available to replace him in the Control Room, where "million of dollars" of equipment required monitoring. **ALWELL** further testified that until this litigation was initiated and he saw the State Police investigation file, he did not know that **WELLS** had instigated the State Police investigation. **WELLS'** allegations of threatened termination for refusal to strip and wax the turbine floor, inspect the condenser tubes, and clean out the hot wells is without **any** factual support from any other Power Plant employee.

In fact, **WELLS** worked overtime as an Operator I when ordered by his Shift Supervisor to strip and wax the turbine floor. When **WELLS** declined the assignment, **HAMERNICK** and Utilities Superintendent A.E. "Sonny" Craig, told **WELLS** to do the work or go home. At no time was **WELLS** ever threatened with termination. **WELLS** was only being told that if he could not do the work, the **CITY** did not want **WELLS** to stay at work, as he was on overtime and being paid time and one half. Regarding the other maintenance chores of inspecting the condenser tubes and cleaning the hot well area of the plant, **WELLS'** co-worker Floyd McFarland testified that when an operator drew this duty, it was purely "luck of the draw" and not punishment.

Further, **WELLS** unsuccessfully attempted to bring a whistleblower action against **HAMERNICK** and **ALWELL** for their removal of scrap roofing material from the City Power Plant. Plaintiff cited *La. R.S. 42:1115(B)* for support that a prohibition only exists for the acceptance of gifts which amount to "anything of economic value". The scrapped roofing materials that had been left at the Plant had no economic value. More importantly **ALWELL** and other power plant employees had been told by the roofing contractor to remove any of the roofing material, otherwise it would be thrown out. The Louisiana State Police did not find a violation of the law, and the Rapides Parish District

Attorney never brought any criminal charges against **HAMERNICK** and **ALWELL.** The allegation that if Director of Utilities, Sonny Craig, had been contacted about this alleged theft that nothing would have occurred, is simply without any factual support in the record. The facts to which all witnesses have testified defeat the plaintiff's claim.

HAMERNICK and **ALWELL** asked Shift Supervisors to have **WELLS** and other Plant Operators perform maintenance work, which were duties contained in their Operator II job description. Other Operator II's have testified that they performed similar work without complaint. On the occasion that **WELLS** stripped and waxed the turbine floor, the work had already been started by Jerome Woods, current Shift Supervisor and Operator II at the time. On that occasion, **WELLS** worked overtime as an Operator I, which required him to perform the maintenance work six (6) months post knee surgery, of which he now complains.

No improper conduct was proved on the part of the defendants, **HAMERNICK** and **ALWELL**, and no vicarious liability against the **CITY** could be maintained. If any retaliation existed in this case, it would be the retaliatory lawsuit filed by **WELLS** after he voluntarily left employment with the **CITY** for a job with the City of Tuscaloosa, Alabama, that he sought one year before his knee surgery and before the alleged retaliatory acts of **HAMERNICK** and **ALWELL**. The testimony of his former supervisor in Alabama, Mr. Kenny Ellison, put it best when he stated that "Chad Wells wanted to be the boss".

NO CONSTRUCTIVE DISCHARGE OCCURRED WHEN WELLS VOLUNTARILY LEFT EMPLOYMENT WITH THE CITY

WELLS indicated in his separation paperwork with the **CITY** that he was relocating to Alabama for a better job.

No allegation that **HAMERNICK** and **ALWELL** did anything improper was made at or before April, 2001, when **WELLS** left the **CITY**'s employment. Cases have held that when an employee is simply required to perform his clearly enumerated job duties, and either refuses to do them, or voluntarily resigns, then no constructive discharge has taken place. *Elsensohn v. Farrington Productions, Inc., 840 So. 2d 611, 619-620 (La. App. 4 Cir. 2003).* Support for this factual conclusion is found in the testimony of **WELLS**' friend and co-worker David Reed, who testified that **WELLS** began looking for employment in Alabama one year prior to his surgery in February, 2000, and prior to the first alleged retaliatory act taken by **HAMERNICK** and **ALWELL** in August 2000.

The **CITY's** personnel policy required that an employee be able to perform ninety (90%) percent of the duties outlined in his or her job description, "without limitations" before returning to work. The November 25, 1997, Memorandum from Mayor Randolph and City Attorney Charles Nunnally further requires that a doctor review the employee's job description and provide written confirmation that he is able to perform the enumerated duties. The Memorandum further provides that "there are no exceptions in this policy". Additionally, it requires as an essential function that an Operator I "paints and cleans equipment in plant to maintain plant appearance and operation" and perform maintenance tasks and assist the maintenance crew in the inspection, overhaul, and repair of turbine generators and auxiliary equipment." Physical requirements of the job of an Operator I enumerated by OSHA/ADA Code 4 are defined as follows:

> "4. Task involves the regular, and at times sustained, performance of heavier physical tasks such as walking over rough or uneven surfaces, bending, stooping, working in

> confined spaces, and lifting or carrying moderately heavy (20-50 pound) items and occasionally very heavy (100 pounds or over) items; or may involve the complex operation of gasoline, electric, or diesel-powered machinery or shop equipment requiring the manipulation of multiple controls, fine adjustments or both: or the sustained operation, on a production basis, of such devises as offset presses with associated equipment."

When Dr. Pope released **WELLS** to return to work on or about February 28, 2000, he wrote on the bottom of the letter from Pam Saurage as follows:

> "Patient, Chad **WELLS** is able to return to work @ City of Alex. As an Operator II @ 90% of Pt's job duties."

Only after **WELLS** decided that he did not want to strip and wax the turbine floor did he go back to Dr. Pope in August of 2000, and obtain the additional restrictions contained therein. Dr. Pope wrote on the bottom of his "Treatment/Restriction Report" dated August 16, 2000, "Okay for normal Operator II avoid constant maintenance, prolonged standing & janitorial duties." This alleged restriction clearly came at **WELLS'** insistence that he did not want to perform maintenance work, but had not been an issue since his release to return to work in late February 2000, after his surgery, through August of 2000.

Petitioner does not mention that **HAMERNICK's** comment that he should go home if he didn't strip and wax the floor came when **WELLS** was working overtime as an Operator I, which required such maintenance duties. Some **CITY** employees, including Darren Sigur, expressed their

"opinion" that maintenance duties were not part of an Operator II's job. However, none of these employees brought a union or civil service grievance to correct this alleged discrepancy, nor could they deny that the phrase contained in the job description of an Operator II, required them to "perform other work as requested".

REASONS FOR DENYING THE WRIT

I. WELLS HAS NOT ARTICULATED A COMPELLING REASON TO JUSTIFY DISCRETIONARY REVIEW BY THIS COURT

"Review on a writ of certiorari is not a matter of right, but of judicial discretion." *Sup. Ct. R. 10.* "A petition for a writ of certiorari will be granted only for compelling reasons." *Id.* **WELLS** has not presented any compelling reason for this Court to exercise its discretionary jurisdiction over the dismissal of his claim. Indeed, his key complaint, that the courts failed to give any weight to petitioner's contradictory evidence, was squarely addressed and dismissed by both the District Court and the United States Fifth Circuit Court of Appeal.

WELLS' attorney cites *Bazley v. Tortorich 397 So. 3d 475, 481 (La. 1981)* to discuss Louisiana law on intent. The *Bazley* case involved an employee who was struck by an automobile as he was mounting the back of a garbage truck during the course of employment. The plaintiff alleged that the accident was caused by his co-employee's intentional acts in operating a garbage truck without a working horn. Ultimately, the Supreme Court defined "intent" as follows:

> "that person who acts either (1) consciously desires physical result of his act, whatever likelihood of that result happening from his

> conduct, or (2) knows that result is substantially certain to follow from his conduct, whatever his desire may be as to that result."

In *Bazley* the Supreme Court held that failure to blow a horn did not rise to the level of an intentional act. **WELL's** interpretation of *Bazley* is misplaced because it does not differentiate between intentional acts and the failure to perform an affirmative act. **WELLS** interpretation of *Bazley* also ignores the Louisiana intentional act exclusion from Worker's Compensation matters. **WELLS'** attorney cites *Benoit v. Capitol Manufacturing Co., 617 So. 2d 477 (La. 1993)* and *Caudle v. Betts, 512 So. 2d 389, (La. 1987)* attempting to address cases where an employer was held to have consciously desired the physical harm resulting from his conduct. The standard enunciated by the Louisiana Supreme Court involved a "conscious desire" for the physical result to follow the act, or knowing that the result is "substantially certain" to follow from the conduct. *Reeves v. Structural Preservation Systems, 731 So.2d 208 (La. 1999)* In *Benoit*, two employees were involved in a fight while at work. An employee brought suit against the co-employee and employer seeking to recover for co-employee's alleged intentional tort. The plaintiff was intentionally injured by his co-employee in the course and scope of his employment and the employer was held vicariously liable for that intentional tort . In the case at bar, **WELLS** was not involved in a workplace fight. The evidence showed that **WELLS** was not intentionally injured by **HAMERNICK** or **ALWELL** when they merely instructed him to do his job, and the **CITY** was not held vicariously liable because no improper conduct occurred. In *Caudle* an employee sued his employer and its chief executive officer for injuries sustained when the CEO administered an electrical shock to the employee as a practical joke. This case is significantly different from

WELLS because no practical joke was played on **WELLS**, resulting in his injury. **WELLS** was simply required to perform his job, and did not want to do it.

WELLS' attorney offers the *Reeves* case for the proposition that "an employee may sue his employer in tort for injuries that result from an intentional act." In *Reeves* the plaintiff sued his employer and co-worker, alleging that injuries sustained from moving a 400 pound sandblasting pot were caused by his employer's intentional acts. In the case at bar, **WELLS'** supervisors ordered him to perform his job. **WELLS'** took issue with the scope of his job duties which should have been taken up in the form of a Civil Service grievance. In *Reeves,* the employer allegedly committed an intentional act within the meaning of the Workers Compensation intentional act exception by directing an employee to manually perform a procedure normally prohibited by OSHA safety regulations, and which the employee's supervisor feared would eventually lead to his injury. **WELLS** produced no testimony or evidence that **ALWELL** or **HAMERNICK** directly participated in any of the acts which allegedly caused his physical injury, and pursuant to the reasoning in *Reeves*, even if they did, there is no liability.

WELLS' attorney also cites *Reeves v. Sanderson Plumbing Prod., Inc., 530 U.S. 133, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000)* for the proposition that lower courts should not make credibility determinations and weigh the evidence when ruling on Rule 50 motions or motions for summary judgment. In *Reeves*, a discharged employee sued his former employer, alleging age discrimination in violation of Age Discrimination in Employment Act. This case is distinguishable from the case at bar because credibility was never the issue. The actions and evidence never showed that two different opinions on a relevant issue entered the summary judgment consideration. **WELLS** was released to perform full duty work on March 17, 2000, by his treating

Orthopaedic surgeon, Dr. Pope. **WELLS** was assigned the stripping and waxing of the turbine floor on August 2000. Not until **WELLS** drew the less desirable duty of stripping and waxing did he return to Dr. Pope seeking additional job restrictions. Clearly, no intent inquiry was necessary by the trial court.

WELLS' attorney cites *Hunt v. Cromartie, 526 U.S. 541 , 119 S. Ct. 1545, 143 L. Ed. 2d 731 (1999),* for the proposition that a disputed fact concerning motivation cannot be resolved at the summary judgment stage. In *Hunt*, North Carolina residents sued various state officials challenging North Carolina's congressional redistricting plan as being racially motivated in violation of the Equal Protection clause. The Court in *Hunt* held that the issue of racial gerrymandering could not be decided on a motion for summary judgment.

> The tack of assessing a jurisdictions motivation, however, is not a simple matter; on the contrary, it is an inherently complex endeavor, one requiring the trial court to perform a "sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Hunt 526 U.S. 541, 546* quoting *Arlington Heights v. Metropolitan Housing Development Corp. 429 U.S. 252, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977).*

Surely, this Court distinguishes between a disgruntled plant operator and State Legislators intentionally gerrymandering Congressional election districts.

WELLS' attorney relied on the case of *International Shortstop, Inv. v. Rallys Inc., 939 F. 2d 1257, 1265-66 (5th Cir. 1991), Cert Den. 502 U.S. 1059, 112 S. Ct. 936, 117 L. Ed. 2d 107 (1992)* for the proposition of why summary judgment is usually inappropriate concerning issues of state

of mind. In *International Shortstop* the owner of a fast food restaurant sued a competitor in Texas state court alleging that the competitor's trade-dress infringement action brought against the corporation was filed in bad faith and constituted tortious infringement. The issue in *International Shortstop* was whether discovery had been completed prior to the hearing of the motion. In the case at bar, **WELLS** participated in seventeen (17) depositions before the motion for summary judgments were filed. Surely he cannot argue that discovery was not complete prior to the hearing on the motion.

WELLS' attorney cites the *In Re: Combustion, Inc., 960 F. Supp. 1076, 960 F. Supp. 1076, 1081 (W.D. LA. 1997)* decision for the proposition that intent is a fact-sensitive determination not appropriately determined in a motion for summary judgment. In the *Combustion* case, summary judgment was denied because a fact issue existed about whether the insureds' pollution damage was caused by the intentional acts of the alleged polluters. That "fact" sensitive issue could not be determined on a motion for summary judgment. In the case at bar, the District Court had the benefit of reviewing seventeen (17) depositions to determine all parties actions, regardless of their intent. Clearly the actions of **ALWELL** and **HAMERNICK** in requiring **WELLS** to perform his job did not rise to the level of an intentional tort.

WELLS' attorney also relied on *Bruce v. Cleggett-Lucas, M.D., 2003 WL 1733530 (E.D. La. 2003)* , for the proposition that summary judgment is seldom appropriate for determinations based on subjective facts, such as motive, intent, good faith, knowledge and malice. In *Bruce,* a plaintiff filed suit alleging that he sustained injuries as a result of the ingestion of and addiction to OxyContin, a narcotic prescription medication. The defendant doctors motion for summary judgment was denied because other issues raised implicated factual questions which could not be

determined on a motion for summary judgment. This case does not apply to **WELLS** because it dealt with material issues of fact in dispute with respect to when the plaintiff's medical malpractice claim accrued. In such circumstances, summary judgment may well be inappropriate. In the case at bar however, no such accrual of a cause of action was at issue. **WELLS**' shifting theories of liability including the Americans with Disabilities act, the Civil Rights Act, a violation of the Louisiana Civil Code of Ethics and the Whistleblower Act, all failed to raise any genuine issue of fact that would have precluded the grant of a summary judgment.

WELLS' attorney also cites *Swope v. Columbian Chems Co., 281 F 3d 185 (5th Cir. 2002),* in which the Fifth Circuit reversed a summary judgment in favor of the employer in a Louisiana intentional tort case in light of competent evidence of intent. In *Swope*, a maintenance worker and his wife sued the employer-chemical company and brought a products liability claim against a successor manufacturer of the employer's ozone generators, for lung damage allegedly sustained during inhalation of ozone. The genuine issue for trial was whether a purchaser already knew or reasonably should have known of the product's dangerous characteristics and whether [an adequate] warning was provided. In the case at bar, no evidence existed that **HAMERNICK** and **ALWELL** knew to a substantial certainty that they were causing **WELLS** to re-injure his knee simply by requiring him to perform his job.

The *FDIC v. Laguarta, 939 F 2d 1231 (5th Cir. 1991),* discussion involved an interpleader action removed to federal court where the FSLIC asserted a counterclaim against a borrower, and the FDIC was substituted as a party. In the *FDIC* case, summary judgment was denied because of the lack of evidence demonstrating that Liberty did not default by failing to advance requested funds. Similarly in the case at bar, **WELLS** did not present any evidence that **ALWELL** or

HAMERNICK intended to harm him by merely assigning him tasks that were part of his job duties.

Further, **WELLS'** attorney misstates this Court's holding in *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S. Ct. 2505, L. Ed. 2d 202 (1986)*, in which this Court held:

> "By its very terms this standard provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact."
> "The substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted."
> "It is the substantive law's identification of which facts are critical and which facts are irrelevant that governs."
> "A party opposing a properly supported motion for summary judgment may not rest upon the mere allegations or denials of his pleading, but... must set forth specific facts showing that there is a genuine issue for trial."

In addition, this Court in *Celotex Corporation v. Catrett, 106 S. Ct. 2548, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)* held:

> If the nonmoving party cannot muster sufficient evidence to make out its claim, a trial would be useless and the moving party is entitled to summary judgment as a matter of

> law. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).*

Furthermore, this Court in the *Matsushita Electric Industrial Co.,v. Zenith Radio Corporation, et al 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*, case held:

> "When the moving party has carried its burden under Rule 56 (c), the opponent must do more than simply show that there is some *metaphysical doubt* as to the material facts. *Deluca v. Atlantic Refining Co., 176 F. 2d 421, 423 (CA2 1949).*
> In the language of the Rule, the nonmoving party must come forward with 'specific facts showing that there is a *genuine issue for trial.'* Fed. Rule Civ. Proc. 56 (e).
> The purpose of summary judgment is to 'pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial'. Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.' *Cities Service, supra, 391 U.S., at 289, 88 S. Ct., at 1592.*

WELLS' evidence in opposition to the defendants' motions for summary judgment should raise more than a "metaphysical doubt" about a material fact. Seventeen depositions of parties and fact witnesses dispelled any doubt that a genuine issue of fact existed which would have precluded the grant of summary judgment. The cases cited by ***WELLS*** are inapplicable in the case at bar, since the facts in those cases are not analogous. In the *Anderson* case, a libel action was brought against a magazine company. This Court

denied Summary judgment in *Anderson* because actual malice issues require the trial judge to weigh the actual quantum and quality of proof necessary to support liability. No such weighing of proof was necessary in the case at bar because **WELLS** could produce proof of malicious intent from any party after taking seventeen (17) depositions.

WELLS' attorney also cites *Topalian v. Ehrman., 954 F 2d 1125, 1131, N. 10 (5th Cir. 1992), REH. DEN., 961 F. 2d 215 (5th Cir. 1992), CERT DEN., 506 U.S. 825, 113 S. Ct. 82 (1992)* which held that an appellate court's inquiry is limited to the summary judgment record before the trial court and parties may not advance new theories or raise new issues on appeal. In *Topalian* investors in an oil and gas limited partnership sued its general partners under federal securities statutes and RICO. Summary judgment was denied because the investors' securities claims were barred by limitations , and their allegations were insufficient to support RICO claims. No such RICO claims or federal securities issues existed in **WELLS.**

In summary, **WELLS** cites numerous cases out of context involving issues so complex that no judge would grant summary judgment on them. The easiest way to distinguish the case at bar from **WELLS'** cited cases is to consider that **WELLS** was simply trying to get out of doing his job, and that no evidence exists from which any judge could conclude that **HAMERNICK** and **ALWELL** committed any state law tort.

II. THE LOWER COURTS DID NOT ERR IN DECIDING THIS CASE

Summary judgment was properly maintained against **WELLS**. He failed to submit any evidence of any improper conduct on the part of the defendants, **HAMERNICK** and **ALWELL**, and hence no vicarious liability against the **CITY** can be maintained.

In addition, **WELLS** alleged a retaliation claim for reporting that **HAMERNICK** and **ALWELL** had taken roofing material for personal use. The U.S. Fifth Circuit agreed with the District Court that summary judgment on this claim was warranted. *La. R.S. 23:967* by its terms requires the employee to advise the employer of a violation of law before reporting it to outside authorities. No evidence existed that **WELLS** advised any official at the **CITY** of **ALWELLS'** alleged theft of roofing material.

WELLS' knee injury claim is governed strictly by Workers' Compensation Act *La. R.S. 23:1032.* No direct evidence existed that the **CITY, ALWELL** and **HAMERNICK** consciously desired that **WELLS** reinjure his knee or knew that this result was substantially certain to follow. **WELLS** was assigned unpleasant cleaning and maintenance assignments, and his request to leave the plant for a physical therapy appointment on fifteen (15) minutes notice was insufficient for a reasonable trier of fact to find that the **CITY, ALWELL** and **HAMERNICK** intentionally tried to re-injure **WELLS'** knee, or knew that an injury was substantially certain to follow from their conduct.

The **CITY, ALWELL** and **HAMERNICK** offered evidence that **WELLS'** job duties included cleaning the plant. The District Court noted that the three specific cleaning and maintenance assignments about which **WELLS** complained occurred during periods where his doctor's treatment/restriction reports state that his activities were unrestricted. [1] Evidence that **HAMERNICK** and **ALWELL**

---

[1] Wells complained about cleaning and maintenance assignments he performed on August 11, 2000, February 3, 2001, and February 12, 2001. A February 28, 2000 doctor report limits his activities to "Light duty at 90%," but states that this restriction is only in effect until March 15, 2000. An August 16, 2000 report states that he should avoid "consistent maintenance, prolonged standing and janitorial duties," but a September 6, 2000 report states that these restrictions are only in effect until October 18, 2000.

were angry at **WELLS** or were motivated by a general desire to retaliate against him is not proof of a desire to physically injure **WELLS.** If the record as a whole could not lead a rational jury to find for the nonmoving party, there is no genuine issue for trial and summary judgment is warranted. *Capital Concepts Props. 85-1 v. Mutual First, Inc., 35 F. 3d 170, 174 (5th Cir. 1994).*

III. NO NEW FACTUAL ISSUE WAS PRESENTED BY DEFENDANTS ON APPEAL

In paragraph 2 of **WELLS'** Questions Presented for Review, he argues that the Court of Appeal erred in deciding a factual issue raised for the first time at oral argument of the appeal, when it was not presented to the district court. Specifically, **WELLS** argued:

> The Court of Appeals erred by:
> (a) allowing counsel for defendants to raise a new issue at oral argument that was not previously argued to the District Court;
> (b) denying petitioner the opportunity to offer evidence in response to that issue; and,
> (c) making a factual determination on that issue in support of its decision sustaining the District Courts' granting of respondents' motions for summary judgment.

Initially, it must be noted that this argument is apparently addressed to the Fifth Circuit's conclusion that:

> "We further note that the three specific

> cleaning and maintenance assignments about which Wells complains occurred during the period where his doctor's treatment/restriction reports state that his activities were unrestricted. [FN2]
>
> Footnote 2 states that:
>
> "Wells complains about cleaning and maintenance assignments he performed on August 11, 2000, February 3, 2001, and February 12, 2001. A February 28, 2000, doctor's report limits his activities to 'light duty at 90' but states that his restrictions only in effect until March 15, 2000. An August 16, 2000, report states that he should avoid "constant maintenance, prolonged standing & janitorial duties,", but a September 6, 2000, report states that these restrictions are only in effect until October 18, 2000."

It is important to note that the Fifth Circuit Court reached this conclusion on these facts taken directly from the Statement of the Facts submitted by the **CITY** and **ALWELL** in the brief submitted to the Court of Appeal. (See page 5 of **ALWELL'S** brief.) Further, the Statement of the Facts is drawn exclusively from exhibits submitted to the District Court jointly by the **CITY, ALWELL** and **HAMERNICK** , which were identified and cited as Exhibit C, **WELLS**' Personnel File with the **CITY**, page 133, and Exhibit F, Deposition of Pamela L. Saurage. Contrary to **WELLS**' argument, the record is replete with references made to these exhibits in pleadings and argument to both the lower courts. For example, in the **CITY**'s reply brief to **WELLS**' Opposition to the Motion for Summary Judgment, at pp. 8-9, reference is made to the reports of Dr. Pope, the

restrictions, and the dates of the reports and/or restrictions. Additionally, in the **CITY**'s original Motion for Summary Judgment reference is made to Dr. Pope's records, restrictions and the dates thereof. (See pp. 12, 24, 26 and 37 of the **CITY**'s Motion for Summary Judgment.) Further, in the Statement of Uncontested Facts submitted by **ALWELL**, at page 2, reference is made to Dr. Pope's report of February 28, 2000, which stated that **WELLS** was to return to work as an Operator II on March 8, 2000. (See pp. 2 and 5 of the Statement of Uncontested Facts.) Furthermore, specific reference is made to Dr. Pope, his reports and restrictions in **ALWELL**'s Memorandum in Support of Motion for Summary Judgment. (See pp. 6, 16, 18 and 27 of **ALWELL**'s Motion for Summary Judgment.)

In contrast to **WELLS'** bold argument that new questions of fact were raised on appeal, even a cursory review of **WELLS'** own deposition, the **CITY, ALWELL** and **HAMERNICK**'s pleadings, and **WELLS'** Opposition to the Motion for Summary Judgment reveal extensive briefing and discussion of Dr. Pope's reports and restrictions. (See also Plaintiff's Opposition to Motion for Summary Judgment, pp. 5 & 26.) Additionally, **WELLS** filed the office notes of Dr. Pope as Exhibit S and the questionnaire of Dr. Pope, changing limitations, dated August 16, 2000, as Exhibit T. Thus **WELLS'** claim that this was a "new" factual issue not previously raised until oral argument before the Court of Appeals is disingenuous and utterly contradicted by the record.

Finally, during the course of **WELLS'** oral argument, **WELLS'** counsel made factual assertions that the instructions given by **ALWELL** and/or **HAMERNICK** violated Dr. Pope's restrictions. In response to **WELLS'** incorrect factual argument that Dr. Pope's restrictions were violated, the panel of judges for the Fifth Circuit were informed that these statements were erroneous and their

attention was directed to the exhibits referenced in the Statement of the Facts contained in the Briefs of the **CITY** and **ALWELL** and attached as brief appendices. (See pp. 5-6 of the Statement of the Facts and the specific exhibits referenced therein.)

In summary, **WELLS'** argument at the Fifth Circuit was contradicted by the exhibits in evidence. When this contradiction was brought to the Fifth Circuit panel's attention, it was apparently deemed significant, as indicated in the April 29, 2004, ***per curiam*** denial of **WELLS'** appeal. The Fifth Circuit's reference to the undisputed evidence submitted by **CITY, ALWELL** and **HAMERNICK** and **WELLS** is nothing more than a refutation of **WELLS'** argument that Dr. Pope's restrictions were somehow violated by the actions of **ALWELL** and/or **HAMERNICK**. In other words, **WELLS** is now seeking a reversal on an issue his attorney raised at oral argument and which was resolved adversely to **WELLS** by the Fifth Circuit's review of the evidence submitted by all parties in the District Court. This should not be allowed.

CONCLUSION

No evidence existed that the **CITY, HAMERNICK** or **ALWELL** understood the exertion required to cause **WELLS** to re-injure his knee. **WELLS** did not specifically tell the officials of the **CITY** or **HAMERNICK** or **ALWELL** that the assignments would cause him to re-injure his knee. Both **ALWELL** and **HAMERNICK** testified that they thought **WELLS** could perform the assignments because **WELLS** had told him he could do the work and **HAMERNICK** had seen **WELLS** jump from the back of boats and run up stairs prior to making the work assignments.

Under modern summary judgment practice, "there is no issue for trial unless there is sufficient evidence favoring

the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-50, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).*

The lower courts appropriately ruled that **WELLS** failed to meet his burden of proof. **WELLS** presents no reason to reevaluate this decision. Moreover, his Petition cites no contrary or more recent authority to discredit the holdings of the lower courts.

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully Submitted,

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Supreme Court, U.S
FILED
NOV 15 2004
OFFICE OF THE CLERK

(3)

No. 04-249

IN THE

Supreme Court of the United States

CHADWICK E. WELLS, PETITIONER

v.

CITY OF ALEXANDRIA; JOHN HAMERNICK;
WILLIAM GERARD ALWELL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF

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I.

In the brief of respondents in opposition, they argued their view of the evidence that was submitted on the Motions for Summary Judgment. However, their brief does not address the main thrust of petitioner's petition, i.e. that the evidence petitioner submitted in opposition to their Motions for Summary Judgment was not construed by the lower courts in a light most favorable to him. This evidence consisted of petitioner's own sworn testimony and the sworn deposition testimony of seven (7) former co-employees, including petitioner's former immediate supervisor.

Additionally, petitioner avers that the rejection by the lower courts of his evidence was the result of their making credibility determinations, weighing the evidence and drawing subjective inferences from the facts, all functions prohibited by this Court in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed. 2d 202 (1986) and Reeves v. Structural Preservation Systems, 731 So.2d 208, 211 (La. 1999).

It is undisputed that both Alwell and Hamernick knew that petitioner was required to attend physical therapy sessions by his treating physician after his knee surgery. They both urge in brief and it was accepted by the lower courts that they were not aware of petitioner's post-surgery medical restrictions on his knee.

The record shows that Alwell testified under oath he didn't remember if there was a question of whether Wells could perform all of his duties after his knee surgery. In contrast, petitioner's immediate supervisor Sigur testified that both Alwell and

Hamernick were aware of petitioner's post-surgery medical restrictions when they specifically ordered Sigur to have petitioner clean the condenser and the hot well. (App. I, pgs. 70a-74a) He had discussed it with them. Neither of the courts below address Sigur's testimony.

In addition, the knowledge of Alwell and Hamernick about petitioner's role in the State Police investigation against them is pertinent. Keith White, a fellow employee, testified that defendants knew of petitioner's involvement in the investigation and both were "mad" about it. (App. L, pgs. 89a-90a; 93a-94a) White stated that both Alwell and Hamernick told him they thought petitioner was one of the instigators of the investigation. (App. L, pgs. 92a-93a)

The evidence submitted by petitioner, if viewed in a light most favorable to petitioner, shows:

(1) While employed as an Operator 2 for the City of Alexandria, petitioner had knee surgery on his right knee on February 1, 2000. The surgery was performed by Dr. David Pope, an orthopaedic surgeon in Alexandria, Louisiana.

(2) Petitioner was released to return to his employment with the restriction that he could perform 90% of his job duties as shown on his job description. (Ex. R)* This was in compliance with the City's policy as set forth in its Memo of Pam Saurage dated November 25, 1997 (Ex. O)*.

(3) Petitioner was required to attend physical therapy sessions after he returned to work and he had several instances where his supervisors balked at letting him off of work to attend these sessions.

(4) On June 30, 2000, Keith White and petitioner contacted the Louisiana State Police in person to report that Alwell had been photographed loading red roofing material into his personal truck and trailer on June 12, 2000. The material was remaining after a new roof had been installed on the power plant by a City contractor. (Ex. M)* John Hamernick and his father-in-law also took some of the material.

(5) The Louisiana State Police investigated the complaint, including interviewing Alwell and going to his house where he had the roofing material stored.

(6) The Louisiana State Police contacted the City of Alexandria Public Works Director, Darrell Williamson, on July 14th concerning its investigation. (Ex. M)*

(7) The Louisiana State Police made a determination that Alwell and Hamernick had not violated any criminal laws and that they had

permission from the contractor to remove the red roofing material and channel iron. (Ex. M)*

(8) After the investigation was concluded, Alwell and Hamernick questioned several employees under their supervision at the power plant to ascertain which employees had instigated the investigation.

(9) Alwell ordered Keith White to his office and interviewed White in front of Hamernick about White's part in the investigation. Alwell indicated to White that he believed that Wells and another employee were involved. Alwell was "upset and mad" about being the subject of the investigation.

(10) Hamernick later told petitioner and two (2) other employees that he and Alwell were going to get even with those employees who instigated the investigation.

(11) At all times pertinent herein, petitioner was under post-surgery medical restrictions concerning his knee during his entire employment with the City after his February knee surgery. (App. E, pgs. 30a-41a)

(12) Alwell and Hamernick were aware of petitioner's post-surgery medical restrictions during the remainder of his employment with the City after his surgery. (App. I, pgs. 73a-74a)

(13) On or about August 11th, defendant Hamernick specifically ordered petitioner to strip and wax the floor of Turbine No. 4. At that time, the plant was generating electricity and petitioner was working as an Operator 1. (oiler) Petitioner protested the order stating his knee's physical restrictions wouldn't allow it. Petitioner was told by Hamernick to do the job or go home if he refused.

(14) Hamernick's order was given with Alwell's approval.

(15) Maintenance and janitorial work are not listed as a primary job duty on petitioner's job description as an operator.

(16) As a result of performing the stripping and waxing, petitioner re-injured his right knee. It became swollen and he was required to seek medical attention. (Ex. S-1)*

(17) As a result of being assigned to strip and wax the floor, petitioner's treating physician increased his restrictions to avoid janitorial duties, maintenance activities and prolonged standing. (Ex. T)*

(18) In January of 2001, petitioner was told by Alwell that he would have to be able to perform 100% of his work or go home. This was in directly contrary to the Memo from the City's Personnel Director, Pam Saurage, dated November 25, 1997. (App. P, pgs. 109a-110a)

(19) On or about February 3, 2001, defendant Hamernick specifically ordered petitioner to get into a hot well chamber and clean it; the hot well chamber being 2 ½ to 3 feet high and requiring a person in it to squat and crawl for several hours. Petitioner complied with this order under the threat of termination.

(20) On February 12th, petitioner was ordered to work inside a condenser unit. The job required climbing and working in a squatting position. Petitioner complied with this order.

(21) On February 21st, petitioner was again ordered to strip and wax the turbine floor.

(22) As a result of his performing the above work, petitioner re-injured his knee and had to seek medical attention. (Ex. S-2)*

(23) Defendant Hamernick was acting with full authority and knowledge of defendant Alwell which defendant Alwell admitted to petitioner. (App. G, pg. 57)

(24) As a result of the continued hostile working environment and continued harassment by the individual defendants, petitioner Wells resigned his employment in April of 2001.

In the District Court's written opinion granting defendants' Motions for Summary Judgment (App. B, pgs. 9a-23a), inexplicably, there is no mention of petitioner's evidence consisting of his deposition and the seven (7) depositions of his co-workers. This evidence is not referred to in the opinion and was completely ignored by the lower court.

Additionally on appeal, it appears that the Fifth Circuit cursorily reviewed petitioner's evidence of defendants' subjective intent and motives. It characterized petitioner's evidence as "colorable" and made an evidentiary determination that the defendants' anger at petitioner and a general desire to retaliate against him was not proof of a desire to physically injure him.

Petitioner submits that both of the lower courts' review of his evidence offered in opposition to

defendants' motions were directly contrary to this Court's pronouncements in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed. 2d 202 (1986) and Reeves v. Structural Preservation Systems, 731 So.2d 208, 211 (La. 1999). There are reasonable direct and indirect inferences regarding defendants' actions toward petitioner that can be drawn in his favor from the evidence he offered in opposition to the motions. These inferences create genuine issues of material fact precluding summary judgment in this matter.

Petitioner submits that the playing field on which his claim was considered was skewed by the failure of the District Court and Court of Appeal to follow this Court's guidelines in *Anderson* and *Reeves*. Hence, the basis for this petition.

Further, in their response, defendants seek to mislead this Court by stating there was testimony by Hamernick and Alwell concerning petitioner's activities after surgery.

The evidence is that Hamernick testified that he knew Wells from work and had deer hunted with Wells one time prior to surgery. He didn't recall fishing with petitioner and he had seen him run upstairs and jump on the back of boats all before Wells' surgery. (Supp. App. Q, pgs. 111a-113a) There is no testimony in the record by Alwell on these points.

II.

Additionally, the Court of Appeal erred in considering deciding an issue not raised in the District Court below while denying petitioner an opportunity to rebut that issue. That question merits consideration by

this Court.

There is no evidence in the record that affirmatively supports the Fifth Circuit's conclusion that petitioner's activities were unrestricted by his doctor.

Prior to oral argument, no party ever argued or ever contended that petitioner was fully released by his treating physician to perform all of his job duties after his surgery. The record shows that everyone understood that petitioner was released to return to work at "light duty at 90%."

At the time he was ordered to strip and wax the turbine floor (August 11th), clean inside the hot well on February 3rd and clean inside the condenser unit of the turbine on February 12th, petitioner had not been fully released by his treating physician. The dispute among the parties has always been the extent of petitioner's 90% restriction, not whether or not any restrictions were in effect as found *sua sponte* by the Fifth Circuit.

After oral argument before the appellate court, in order to prevent an incorrect conclusion on this point on a ground that was not raised below by the parties or by the District Court, petitioner attempted to supplement the record with a complete certified copy of petitioner's treating physician's records which reflected the true facts regarding petitioner's medical restrictions upon his return to work. The Court of Appeal denied this motion. (App. E, pg. 42a) The Court then proceeded to make an adverse false and inaccurate factual finding against petitioner. Additionally, the Court buttressed its conclusion with a statement from defendants' brief that Hamernick had testified that he had seen Wells jump from the back of boats and run up

stairs which a simple perusal of the record would have disclosed that those events occurred prior to Wells' surgery and not after. See Supp. App. Q, pgs. 111a-113a.

III. Conclusion

Petitioner believes the lower courts deviated from the holding and guidelines set by this Court in *Anderson* and *Reeves*. Additionally, the Court of Appeals erred in determining an issue not raised in the District Court below while denying petitioner an opportunity to offer evidence to rebut that issue. Both of these points merit consideration by this Court.

Respectfully submitted,

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A DO YOU MEAN WHAT DO I REMEMBER ABOUT IT?

Q YES.

A BASICALLY I DON'T REMEMBER THE FIRST TIME I CAME IN CONTACT WITH HIM.

Q OKAY. HE WAS HIRED AS AN OPERATOR ONE?

A I BELIEVE SO. I WOULD HAVE TO REFER TO THE RECORDS TO MAKE SURE, BUT I BELIEVE SO.

Q OKAY. DO YOU KNOW WHOSE SHIFT HE WAS ORIGINALLY ON?

A NO, I DO NOT.

Q WERE YOU AWARE PRIOR TO HIS SURGERY THAT HE HAD A PROBLEM WITH HIS KNEE?

A NO, NOT THAT I REMEMBER.

Q WELL, WHEN DID YOU FIRST BECOME AWARE THAT HE HAD A PROBLEM WITH HIS KNEE?

A AS FAR AS FOR WITH THE CITY AND HIS EMPLOYMENT? I HAVE NEVER SEEN ANY ADVERSE ACTION THAT CHAD EVER HAD. I HAVE SEEN HIM JUMP FROM THE BACK OF BOATS, RUN UPSTAIRS.

MR. ROZANSKI :

I DON'T THINK HE IS UNDERSTANDING YOUR QUESTION.

MR. BROUSSARD:

YEAH, ALL RIGHT.

BY MR. BROUSSARD

Q MY QUESTION IS, YOU UNDERSTAND HE HAD A SURGERY? YOU ARE AWARE HE HAD SURGERY ON HIS RIGHT KNEE?

* * * * *

A YES.

Q OKAY. AND WHAT IS YOUR UNDERSTANDING OF WHAT THAT MEMORANDUM SAYS?

A IT STATES THIS - THAT YOU MUST BE CAPABLE OR ABLE TO PERFORM NINETY PERCENT OF THE DUTIES OUTLINED IN YOUR JOB DESCRIPTION WITHOUT LIMITATIONS BEFORE RETURNING TO WORK.

Q OKAY. DID YOU EVER TELL CHAD WELLS THAT THERE WASN'T ANY LIGHT DUTY FOR THE POWER PLANT WHEN HE CAME BACK FROM SURGERY?

A NOT THAT I RECALL.

Q DID YOU EVER HEAR ANYBODY TELL HIM THAT?

A I DIDN'T HEAR IT, NOT THAT I RECALL.

Q OKAY.

MR. BROUSSARD:

IN CONNECTION WITH HIS TESTIMONY THIS WILL BE HAMERNICK NUMBER FIVE - FOUR, I MEAN. YEAH.

BY MR. BROUSSARD:

Q WHEN YOU SAID YOU SAW CHAD JUMPING OUT OF BOATS AND ALL DID - WAS THIS BEFORE OR AFTER HIS SURGERY?

A BEFORE DEFINITELY.

Q DO YOU KNOW A LADY BY THE NAME OF BRENDA SANDERS?

A YES.

Q WHO IS BRENDA SANDERS?

A A PREVIOUS EMPLOYEE.

Q WAS SHE TERMINATED OR DID SHE JUST--